TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 221.

C. E. MITCHELL, ADMINISTRATOR DE BONIS NON OF C. S. BARRON, DECEASED, APPELLANT,

vs.

JOHN H. DOWELL AND H. M. MANDEVILLE, LATE PARTNERS AS J. H. DOWELL & CO.

FILED JULY 31, 1879.

No. 467.

JOHN H. DOWELL AND H. M. MANDEVILLE, LATE PARTNERS AS J. H. DOWELL & CO., APPELLANTS,

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FILED FEBRUARY 17, 1880.

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1 Be it remembered that on the 22nd day of August, 1877, came into the clerk's office of the circuit court of the United States for eastern district of Arkansas, J. H. Dowell & Co., by Henderson and Caruth, esq's, their solicitors, and filed therein their bill of complaint against Benj. F. Askew et al.; which bill is as follows:

To the hon. circuit court of the United States, in chancery sitting:

Your orators, John H. Dowell, H. M. Mandeville, late partners in business as J. H. Dowell & Co., would respectfully state unto your honor' that they are citizens of the State of Missouri, and that the defendants, Benj. F. Askew, W. H. Brazzell, Margaret Barron, Maggie M. Lint, L. Walter, George and Oscar Barron are citizens of Hempstead County and Columbia County, in the eastern district of Arkansas.

These complainants would further show unto this hon. court that in the year 1873 they were cotton factors and commission merchants doing business in the city of St. Louis, Mo., and in that in the same year, Claiborne S. Barron and William H. Brazzelle entered into part-

2 nership and began business under the firm name of Barron and Brazelle, at the town of Hope, in the county of Hempstead; said partnership being formed for the purpose of doing a general mercantile business, with the understanding and agreement between said partners that the profits and losses should be equally shared, and it being well known and understood in the city of St. Louis that the said Barron was in possession of large means and reputed to be entirely solvent, said firm readily acquired an extensive credit on the faith of said reputed solvency, and that in the course of business the complainants became the factors and commission merchants of said firm of Barron & Brazzell, so that by reason of large sums of money advanced, and goods, wares, and merchandise sold and delivered to said Barron & Brazzell at their instance and request during the following years, so that on the 4th day of October, 1875, said firm was indebted to the complainants in the sum of fifteen thousand nine hundred and eighty-nine $\frac{62}{100}$ dollars ($15,989\frac{62}{100}$), and that on that day the said Barran departed this life at the county of Columbia intestate, and that on the 14th day of said

3 month, in the year 1875, by the consideration and order of the probate court of Columbia County, Arkansas, the defendant, B. F. Askew, was appointed administrator of the estate of the said Barron, who has since been and is now acting as such administrator, a copy of which is herewith filed, marked Exhibit A, and prayed to be made part hereof.

The complainants would further state unto this hon. court that defendant Margaret Barron is the widow of said Claiborne S., deceased, and that Maggie M. Lint, M. Walter, George and Oscar Barron, who are left him surviving as his children and heirs-at-law, and are minors under the age of eighteen.

The complainants would further show unto this hon. court that the defendant, William H. Brazzell, as surviving partner by the death of said Barron; was left in possession with a large stock of goods and a heavy outstanding indebtedness due the firm, which required prompt action and vigorous efforts to collect, and that in order that no confusion arise, or injustice be done to either the estate of Barron or to the creditors of said firm, the said Brazzell called to see the said Askew, who had then qualified as administrator of Barron

4 and had a conference with him and said Margaret, widow of said Barron, and proposed to make out a full and complete inventory of the property belonging to the firm, and after full deliberation it was

agreed between the said Brazzell, as surviving partner, and the said Askew, as administrator, and the said Margaret, as the widow of said Barron, that said Brazzell should continue to run the business under the firm name as before, and do any and all things in and about said business, which he, in his judgment, might think proper or necessary to wind up and close out said business to the best advantage of all parties interested.

The complainants would further show unto your honor that the said Brazzell, immediately after the conference aforesaid, informed these complainants that the business of said firm would be continued as before, and that they need not be in the least uneasy about their debt, for the assets were ample to meet all the obligations of the firm then outstanding, and that no objections would be offered on the part of the representatives of said Barron, dec'd, to his conducting the business as he saw proper, with a view, however, of closing out said business at as an early a period as possible.

5 The complainants would further show unto your honor that the cotton crop was the principal staple of the country in which said business was being conducted. It was very important to the interest of all parties concerned that the said Brazzell should have advances in cash in order to enable him to successfully enter the cotton market in competition with other merchants, who also had large balances due them, and were freely using money in the payment of balances or advances on shipments, and unless the said advances had been made by these complainants the estate would have sustained heavy losses in failing to collect the outstanding debts, and they allege and charge that said advances were made for the benefit of the estate of Barron, as the said Brazzell was enabled to collect a large sum in excess of the sum advanced by these complainants after Barron's death, as they are informed and believe, and therefore state the fact to be, that the indebtedness of said firm on the 4th day of October, 1875, far exceeded twenty-five thousand dollars ($25,000), and that the said Brazzell, at the close of the business season in April, 1876, had paid all of the debts of said firm except about ten thousand ($10,000)

6 dollars, and that not over one thousand dollars, excluding the balance due these complainants, remained unpaid.

And the complainants further charge and state the fact to be, that it was through the aid furnished the said defendants in enabling them to collect their outstanding debts; that any considerable portion thereof were collected, and that beyond the stock on hand at the date of said Barron's death, and its conversion into money, but *better* could have been realized from the assets of said firm unless the said Brazzell had received cash from some source to pay balances in cash, or to advance on shipments made through him to a wholesale market, and that in truth and in fact these complainants, in the month of October and November of 1875, immediately after the said Barron's death, advanced to said firm, and upon the faith and credit of said estate of said Barron, large sums of money for the purpose of having the same used in aid of said business, and to enable them to secure the collection of the debts, and that the fact is, as they are informed and believe, that their said advances were used by said Brazzell in conducting the business in good faith for that purpose under the agreement of said Brazzell and

7 "Askew" as administrator, and the said Margaret B., as stated; and that on the 15th of April, 1876, when the complainants had a settlement with the defendants, through William H. Brazzell, there was then a balance of eight thousand four hundred and forty-six dollars

and eighty-three cents ($8,446.83), as will appear by a seperate account filed, including transactions had with said firm after the death of said Barron, which is made Exhibit B and a part of this bill. And that the said Brazzell then and there closed up the said account in the name of said firm of Barron and Brazzell in pursuance of the authority so conferred on him by said representatives of the estate of Barron by executing their three several notes, payable as follows: One for $2,815.61, due October 15th, 1876; one for 2,815.61, due November 15th, 1876; and one for 2,815.61, due December 15th, 1876, all bearing ten per cent. per annum interest from date until paid, and all bearing date April 25th, 1876, and in order to secure the payment of the same, he made, executed, acknowledged, and delivered to these complainants a deed of trust or mortgage on the following described property situated in the town of Hope and county of Hempstead, to wit, lot numbered one (1)
8 and two (2) in block twenty-seven (27) in the town of Hope aforesaid, together with the improvements thereon, which mortgage was duly filed for record in the recorder's office in the county of Hempstead, on the 27th day of April, 1876. A copy of said mortgage is filed herewith and marked Exhibit C, and prayed to be taken as a part of the bill.

The conditions of said mortgage or trust deed are as follows: "That the said Barron and Brazzell shall well and truly pay off said notes as they mature on or before the 15th day of December, 1876, together with all accrued interest thereon, then this conveyance be void; otherwise a power of sale was conferred on these complainants to offer said property for sale at public sale. Notwithstanding the time fixed by said trust deed for the payment of the notes secured thereby has long since elapsed, the same remains wholly unpaid, and that default has been made in the payment of the notes as therein agreed, whereby a right of action has accrued to these complainants for a breach of conditions of said trust or mortgage deed.

But these complainants would state and show unto this honorable court that, notwithstanding the general authority conferred
9 on the said Brazzell and their knowledge of the course of dealing between these complainants and the said Brazzell, the said Askew now pretends that the old accounts of the said Barron and Brazzell have been paid by the shipment of large amounts of cotton and other marketable products by the said Brazzell, after the said Barran's death, although he refuses now to recognize the authority of said Brazzell to contract in the firm name of Barron & Brazzell. Yet the complainants say that no distinct agreement was ever made between the said Brazzell and themselves as to how the credits were to be applied. Nor did the said debtor ever direct in what way or to what items in said accounts the payment made by him were to be applied, and that in stating said account they made a rest at the death of said Barron and furnished two accounts, and did apply the credits made by Brazell to the extinguishment of the indebtedness so incurred by him. These complainants say that the said Askew, as administrator of the estate of Barron, in authorizing said Brazzell to proceed to close up the business in such ways as in his judgment seemed best, and in being present often in the storehouse,
10 and familiar with the manner in which the business was being conducted, was in fact an approval of such course pursued by the said Brazzell, and was a fraud on the rights of these complainants, or would be, should he be permitted to claim the benefit of the application of the payment made by Brazzell to the satisfaction of the debt

agreed between the said Brazzell, as surviving partner, and the said Askew, as administrator, and the said Margaret, as the widow of said Barron, that said Brazzell should continue to run the business under the firm name as before, and do any and all things in and about said business, which he, in his judgment, might think proper or necessary to wind up and close out said business to the best advantage of all parties interested.

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accrued prior to the said Barron's death, and he be permitted to disown and repudiate the act done, whereby he was enabled to secure the payment.

That the advance of money, bagging, and ties, and provisions made by the complainants, went largely to swell the fund out of which these debts could be paid, and in fact were paid.

That defendants Askew and Margaret Barron, as widow of the said Claiborne S. Barron, deceased, by their conduct induced the complainants to come thus to the rescue of said estate, and now are endeavoring to avoid the responsibilty resulting from their act.

And these complainants would show unto this honorable court that there is a valuable two-story brick storehouse, situated on the block of ground mortgaged herein as well as a large warehouse, and the same is now in the possession of said Askew, as the administrator of the estate
11 of Barron, and is using and appropriating the rents arising therefrom in the seperate estate of the said Barron; that the rents amount to a large sum, to wit, the sum of one thousand dollars per annum, and that the said storehouse and warehouses were built out of the partnership assets of the said Barron and Brazzell by the said firm before the death of the said Barron, and cost over eight thousand dollars; and that the said property was used and treated as partnership property, although the legal title in said lots were in Barron at the time of his death. The buildings were just about complete at the death of said Barron and ready for occupancy; and that the said Brazzell, after the death of the said Barron moved the stock of goods into said store and took possession of said houses under and by virtue of the agreement of the Barron with him; that he would make the firm a deed to said lots when they got ready to move in; and that, confiding in the promise the said Barran, as they are informed and believe, to make a deed to the said Brazzell consented to the investment of the capital of said concern in the erection of this expensive building and thereby taking eight or ten tnousand dollars from the capital of their said business;
12 that said Barron did agree with the said Brazzell to execute a deed to him for a one-half interest in said lots of ground, but on account of the sudden death of the said Barran of heart disease he did not do so; that said storehouse and warehouse were built with partnership funds and for partnership purposes, and were used before the death of said Barron for partnership uses; that said lots of ground cost said Barron about three hundred and fifty dollars, and were worth when so appropriated for partnership uses and purposes by the said Barron five hundred dollars. The purchase money for the said lots was not paid by the said Brazzell, but the same was to have been charged to his account on the books of the firm, and the complainants offer here to have the same charged as against them in stating the account, or will pay into court a fair price for the one-half interest of said grounds at the time it was so agreed to be conveyed and was appropriated to the uses of said partnership; that said property is insufficient to pay the mortgage debt, and the rents being diverted from partnership purposes or debts and applied in the seperate estate of the said Barran; that they have had their said demand duly and legally authenticated and
13 presented to the administrator of the estate of said Barron, and by him disallowed within two years from the grant of letters on said estate.

The complainants would further state unto your honor that there is now due them from the late firm of Barron & Brazell the sum of eight thousand four hundred and forty-six dollars and eighty-three cents

principal, with ten per cent. interest thereon from the 25th day of April, 1876, up to this the 27th day of July, 1877, amounting, in all, to the sum of nine thousand five hundred and two dollars and sixty-eight cents (9,502.68), which they say is a lien and charge on said mortgaged property. The premises being seen and understood, the complainants pray process against the defendants, that they be required to answer said bill, and that upon the final hearing your honor decree that an account be taken and stated between the complainants and the said defendants, and that a decree be rendered for the balance so found due them; that the heirs of Barron be declared trustees; that the mortgagers' interest in said mortgaged property be foreclosed, and if the money be not paid by a day named the said property be sold
14 under a decree of this court to satisfy said amount, and that a receiver be appointed to take possession of said mortgaged property, and rent and hold the proceeds thereof subject to the final decree of this court in this cause, and for such other and general or special relief as the complainants' case may require, or this honorable court may deem just, consistant with this bill.

W. F. HENDERSON,
Sol. for Complainants.

I, J. H. Dowell, one of the complainants, do, upon my oath, say that each and every allegation contained in said bill, made on my own knowledge, is true, and such as made upon the information of others I believe to be true.

J. H. DOWELL.

Sworn to and subscribed before me this 31st day of July, A. D. 1877.
[SEAL.] C. D. GREEN, JR.,
Commissioner for Arkansas, at St. Louis, Missouri.

15 STATE OF MISSOURI,
City & County of St. Louis, ss:

OFFICE OF GARLAND & GREENE.

Be it remembered that before the undersigned, a commissioner for the State of Arkansas, at St. Louis, aforesaid, appeared John H. Dowell, who, being duly sworn, on his oath, states that he is a member of the firm of J. H. Dowell & Co., composed of affiant; that on April 15, 1876, Barron & Brazzell, of Hope, Ark., were, and still are, justly indebted to the said J. H. Dowell & Co., for goods, wares, and merchandise sold and delivered as stated and set forth in the annexed account, and that the amount due and owing thereon then and now, is $8,446.83 dollars, together with interest from , at the rate of per cent. per annum, after allowing all just credits, deductions, and set-offs to which the said Barran & Brazell are entitled, and exclusive of usury.

J. H. DOWELL.

Sworn to and subscribed before me this 18th day of July, 1877.
Witness my hand and official seal the day and year last aforesaid.
[SEAL.] J. S. GARLAND,
Commissioner for Arkansas, at St. Louis, Missouri.

16 EXHIBIT B.

Messrs. Barran & Brazzell, Hope, Ark., in a/c with J. H. Dowell & Co.

	1875.				
Sept.	6.	To	balance as per a/c rend'd	13,543	87
	7.	"	drafts to J. R. Giles	100	
	9.		Cook, Gibb & Co	17	31
	10.		Sherb & Boland	21	94
	13.		W. H. Leadbetter	82	50
	11.	"	invoice flour	139	40
	13.	"	do. bacon	664	77
	17.	"	draft to G. Hable	200	
	21.	"	J. J. Scott	19	60
	"	"	Kingsland, Fergurson & Co	252	70
	"	"	H. C. Pierce & Co	96	
	18.	"	invoice sundries	198	34
	21.	"	do. ochre	8	20
	23.	"	draft to W. F. Bitts	52	54
	"	"	invoice bagging	1,483	
	24.	"	cash to self	25	
	25.	"	do. by express	1,000	
	30.	"	do. to self	625	
Octo.	2.	"	pd. dyeing dress	1	50
	4.	"	cash by express	500	
	6.	"	draft to F. N. Johnson	16	
	"	"	A. F. Shapleigh & Co	35	37
	8.	"	H. C. Pierce & Co	77	20
	"	"	Jas. Gallaway & Co	52	30
	"	"	Moore & Co	178	25
	9.	"	S. Cupples & Co	57	52
	11.	"	Hamilton & Brown	541	85
	12.	"	cash by express	1,000	
	"	"	draft to J. F. Stratton & Co	7	60
	13.	"	W. P Powell & Co	135	65
	14.	"	A. A. Millier	100	
	16.	"	M. Sauders	118	75
17	1875.				
Octo.	18.	To	draft to H'y Ames & Co	1,000	
	13.	"	cash from J. C. Cannon	100	
	20.	"	pd. telegrams	1	
B.	22.	"	cash from J. C. Cannon	500	
	"	"	do. " do.	200	
	26.	"	draft to F. Mitchell & Bro	223	82
	28.	"	cash by express	1,000	
	29.	"	draft to A. A. Millier	50	
	"	"	accep. to Probst & Hilb, due Nov. 21	317	83
Nov.	1.	"	draft to Shyrock & Rowland	52	
"	"	"	Fones Bros	34	59
	4.	"	W. D. Brady	25	
	6.	"	yr. acceptance, W. C. Harris & Co. d'f't.	406	13
	3.	"	cash from J. C. Cannon	500	
	8.	"	draft to L. M. Rumsey & Co	68	54
	"	"	H. C. Pierce & Co	258	30
	"	"	cash by express	1,000	

	9.	"	draft to S. Cupples & Co	243	65
	"	"	Jno. H. Malvin & Co	70	
	"	"	cash from J. C. Cannon	1,000	
	11.	"	draft to P. F. Finley	322	54
	"	"	do.	66	40
	"	"	your note due this day	5,000	
	13.	"	draft to Adam Given	300	
	"	"	T. R. Pullis	5	
	16.	"	S. Cupples & Co	33	50
	15.	"	Boatman's Savings	245	20
	"	"	A. J. Nellis & Co	19	95
	"	"	Schmidt & Zeigler	215	25
	"	"	Bauer & Bohle	299	50
	"	"	T. J. Canida	100	
	16.	"	cash by express	1,000	
18	17.	To	invoice feathers	89	49
	16.	"	cash from J. P. Cannon	300	
	19.	"	draft to Fones Bros	180	
	"	"	Holliday & De Yomd	127	50
	16.	"	cash from J. C. Cannon	200	
	23.	"	draft to F. Mitchell & Bro	972	86
	24.	"	T. R. Pullis	379	67
	"	"	cash from J. C. Cannon	500	00
	26.	"	draft to J. J. Scott	45	
	"	"	Thompson & Holliday	40	
	"	"	accept to Crow, Hargadine & Co., due Dec. 27th	3,345	05
	25.	"	cash from J. C. Cannon	1,000	
	27.	"	draft to Scott, Collins & Co	40	85
	29.	"	Jas. P. Lowry	23	
	"	"	F. Mitchell & Bro	100	
	30.	"	M. Sauders	90	10
	"	"	cash from J. C. Cannon	500	
	27.	"	invoice glass	13	12
Dec.	2.	"	cash by express	1,000	
	"	"	p'd telegram	1	
	3.	"	draft to S. W. Hastings & Co	200	
	4.	"	cash by express	2,000	
	"	"	draft to B. A. Harron	173	80
	"	"	note to Hamilton & Brown	578	55
	"	"	accep' to Liggett & Myers, due Dec. 16th	397	52
	6.	"	draft to C. M. Furrey & Co	200	
	"	"	R. Gaines	100	25
	"	"	Lewis Young & Co	45	
	7.	"	Hamilton & Brown	95	
	8.	"	C. Alexander	60	
	"	"	J. H. Weir & Co	257	24
	9.	"	Moore & Co	89	38
19	1875.				
Dec.	9.	To	draft to Lesley, Garnut & Co	41	
	"	"	B. A. Herron	26	10
	"	"	McLaran, Williams & Co	6	60
	10.	"	S. Rice	40	
	11.	"	F. Mitchell & Bro	200	
	"	"	Semple, Birge & Co	174	
	"	"	G. A. Pike	295	

	"	"	L. W. Coy	169	92
	"	"	your note due this day	5,000	
	"	"	cash by express	1,000	
	13.	"	draft to B. A. Hickman	147	
	14.	"	B. Lowenstein	200	
	15.	"	R. Gaines	100	65
	"	"	W. J. Ferguson	1,090	69
	14.	"	cash from J. C. Cannon	300	
	16.	"	draft to D. M. Ferry & Co	100	
	18.	"	cash by express	1,000	
	20.	"	draft to J. M. Loughboro	229	40
	"	"	Doling & Langueberg	50	
	22.	"	cash by express	1,000	
	23.	"	draft to Mixon & Hartin	56	65
	"	"	Black & Brittan	298	50
	24.	"	cash by express	1,000	
	28.	"	draft to C. Kahn	100	
	29.	"	Dozier, Weyl & Co	75	
	"	"	cash by express	1,000	
	30.	"	d'ft to F. Mitchell & Bro	1,004	70
	"	"	S. Rice	100	
	"	"	C. Alexander	50	
1876.					
Jan'y	3.	"	Home Bitters Co	66	21
	1.	"	cash from J. C. Cannon, Dec. 31st	300	
	4.	"	accep' to Blakny & Bro., due Jan'y 17	300	
1876.					
Jan'y	4.	To	cash by express	1,000	
	5.	"	draft to Blakey & Bro	80	
	7.	"	J. F. Collis	135	
	12.	"	cash by express	1,000	
	13.	"	draft to Sam'l C. Davis & Co	340	
	14.	"	F. Reichart & Co	211	65
	15.	"	H. G. Thias & Co	412	24
	17.	"	E. A. Damon & Co	470	58
	"	"	B. Horton & Co	143	12
	"	"	Halliday & De Young	300	
	14.	"	cash from J. C. Cannon	150	
	18.	"	draft to L. G. Scarritt	182	35
	21.	"	C. Alexander	50	
	22.	"	J. T. Camida	100	
	27.	"	cash from J. C. Cannon	500	
Feb'y	5.	"	draft to Hartwell & Chambers	661	57
	8.	"	L. W. Craig	75	
	"	"	Dozier, Weyl & Co	32	30
	12.	"	A. Samuels	188	
April	13.	"	interest	904	81
				71,562	78

CR.

1875.					
Sept.	9.	By	proceeds of $5,000 note, @ 60 %, discounted by us	4,911	12
"	"	"	" $5,000 note, @ 90 %, discounted by us	4,869	45

		" "	reclamation on corn			60	
		" "	"	" flour		25	
		20. "	sales 3	4 b. c		229	87
		23. "	6	5 "		283	15
21	Sept.	30. By	sales 8	7 b. c		374	02
	Oct.	1. "	cash from Iron M't R. R.			30	
		6. "	sales 12	1 b. c		56	88
		" "	13	3 "		151	80
		9. "	14	4 "		212	98
		12. "	17	14 "		779	98
		14. "	18	19 "		1,006	19
		19. "	23	3 "		182	86
		" "	25	17 "		1,009	31
		20. "	26	4 "		211	46
		22. "	28	2 "		123	04
		23. "	30	4 "		235	55
		" "	33	1 "		27	29
		" "	32	6 "		379	86
		28. "	34	20 "		1,115	70
	Nov.	2. "	36	4 "		206	13
		4. "	37	9 "		499	17
		5. "	38	13 "		725	87
		8. "	39	36 "		1,955	69
		10. "	40	15 "		809	11
		12. "	42	21 "		1,142	95
		17. "	44	16 "		890	96
		" "	45	3 "		173	74
		18. "	46	12 "		640	47
		22. "	48	7 "		368	76
		24. "	49	2 "		104	25
		" "	50	50 "		2,668	81
		28. "	51	1 "		54	45
	Dec.	3. "	cash for corn			2	50
		9. "	do. by letter			52	83
		2. "	sales 52	2 b. c		118	21
		5. "	53	56 "		3,060	91
22	Dec.	7. By	sales 54	31 b. c		1,579	92
		8. "	55	2 "		116	99
		10. "	56	2 "		106	58
		13. "	58	19 "		946	97
		20. "	59	6 "		331	25
		22. "	60	31 "		1,680	71
		27. "	61	46 "		2,590	51
		28. "	62	5 "		291	36
		1876.					
	Jan'y	3. "	64	2 "		139	16
		6. "	65	68 "		3,755	83
		1875.					
	Dec.	5. "	53	1 "		55	84
		1876.					
	Jan'y	7. "	66	1 "		64	36
		1875.					
	Dec.	27. "	61	1 "		59	10
		13. "	58	4 "		193	81
		1876.					
	Jan'y	27. "	67	163 "		7,863	47

Feb'y	5.	"	68	23 "	.....	1,055 86
	6.	"	69	5 "	.....	272 55
	2.	"	hides		.....	32
	19.	"	dried fruits		.....	9 01
	11.	"	70	26 "	.....	1,283 67
	19.	"	71	7 "	.....	352 05
	25.	"	73	13 "	.....	649 78
	"	"	74	9 "	.....	290 79
	"	"	75	14 "	.....	483 91
	28.	"	76	6 "	.....	273 25
March	1.	"	77	14 "	.....	514 22
	2.	"	78	1 "	.....	31 35
	6.	"	80	31 "	.....	1,153 56
	11.	"	81	1 "	.....	19 71
	13.	"	82 & 83	27 "	.....	1,024 26
	14.	"	84	16 "	.....	853 53
	17.	"	85	2 "	.....	60 62

23 1876.

March	17.	By sales	86	1 b. c	.....	32 89
	"	"	87	1 "	.....	34 21
	"	"	88	1 "	.....	54 18
	23.	"	89	16 "	.....	564 06
	"	"	91	4 "	.....	210 32
	"	"	92	4 "	.....	176 61
	27.	"	93	22 "	.....	934 09
	31.	"	"	2 "	.....	79 28
April	3.	"	96	13 "	.....	570 62
	5.	"	97	6 "	.....	312 71
	3.	"	101	1 "	.....	40 73
	"	"	this sum for loss of draft or A. J. Nellis & Co		.....	19 95
	15.	"	44 b. c. taken to account sold to us by Brazzell, @ $50 p'r bale, $\frac{44}{1053}$		.....	2,200 00
						63,115 95
			Am't of debits		.....	71,562 78
			Balance due us April 15, 1876		.....	$8,446 83

E. & O. E.
St. Louis, April 15, 1876.

J. H. DOWELL & CO.,
By H. T. NORCOM.

24 STATE OF MISSOURI,
City of St. Louis, ss :

OFFICE OF GARLAND & GREENE.

Be it remembered that before the undersigned, a commissioner for the State of Arkansas, at St. Louis, aforesaid, appeared John H. Dowell, who, being duly sworn on his oath, states that he is a member of the firm of J. H. Dowell & Co., composed of affiant; that on October 4th, 1875, Barran & Brazzell, of Hope, Ark., were justly indebted to said J. H. Dowell & Co. for goods, wares, and merchandise sold and delivered, as stated and set forth in the annexed count, and that the amount due and owing thereon was $15,989.62 dollars, together with interest from , at the rate of per cent. per annum, after

allowing all just credits, deductions, and set-offs to which the said Barran and Brazzell were then entitled, and exclusive of usury.

J. H. DOWELL.

Sworn to and subscribed before me this 18th day of July, 1877. Witness my hand and official seal the day and year last aforesaid.

[SEAL.] J. S. GARLAND,

Commissioner for Arkansas, at St. Louis, Missouri.

25 *Messrs. Barron & Brazzell, Hope, Ark., in a/c with J. H. Dowell & Co., St. Louis.*

1875.				
June	10.	To balance due as per a/c rendr	3,727	77
	16.	" draft to Udell, Schmeiding & Co	193	64
	"	" Scott, Collins & Co	21	50
	12.	" invoice meal	97	38
	21.	" corn	66	44
	"	" meal	92	25
July	1.	" draft to O. H. Pickham & Co	144	05
	"	" invoice of sundries	476	98
	3.	" draft to J. B. Blakemore	40	30
	7.	" N. F. Little	200	
	13.	" Selves	100	
	14.	" Chas. Robstock	20	
	12.	" invoice of sundries	249	68
	15.	" bagging & ties	994	50
	17.	" sundries	246	
	19.	" do.	193	65
	24.	" draft to Newell Bro's	1,188	50
	"	" p'd telegram	1	50
	27.	" draft to Henry Ames & Co	119	30
	22.	" invoice bacon	476	99
August	2.	" draft to S. W. Hastings & Co	348	58
	3.	" Tyra, Hill & Co	37	50
	"	" P. N. Drake	100	
	"	" invoice of sundries	333	38
	4.	" draft to P. N. Drake	100	
	10.	" F. Mitchell & Bro	331	83
	11.	" Liggart, Hudson & B	588	40
	"	" invoice bacon	503	18
	14.	" lime	112	75
	23.	" draft to Crow, McCreary & Co	926	20
	31.	" invoice bacon	461	49
	Sept. 3.	" draft to N. F. Little	55	83
26	Sept. 2.	To draft to F. Mitchell & Bro	606	45
	"	" McLaran, Williams & Co	25	
	"	" N. F. Little	165	02
	4.	" Bryant & Bayless	81	84
	"	" J. S. Ware & Bro	50	40
	"	" Sanderfer & Paup	175	76
	"	" Gomsfedder Bro's & L	17	48
	6.	" interest	169	84
			$13,841	36

CR.

1875.					
July	1.	By sales hides		12 40	
	8.	" cash by W. J. Howard		28 00	
	13.	" sales 133, 1 b. c		51 93	
	19.	" 134, 2 "		108 61	
Aug.	4.	" 135, 2 "		96 55	
					297 49
		Am't of debits		13,841 36	
		Am't due us Sept. 6, 1875			$13,543 87

E. & O. E.
St. Louis, Sept. 6, 1875.

J. H. DOWELL & CO.,
By H. T. NORCON.

27 *Messrs. Barran & Brazzel, Hope, Ark., in a/c with J. H. Dowell & Co., St. Louis.*

1875.					
Sept.	6.	To balance rend		13,543 87	
	7.	" draft to J. R. Giles		100	
	9.	" Cook, Gibbs & Co		17 31	
	10.	" Sherb & Boland		21 94	
	13.	" W. H. Ledbetter		82 50	
	11.	" invoice flour		139 40	
	13.	" bacon		664 77	
	17.	" draft to G. Noble		200	
	21.	" J. J. Scott		19 60	
	"	" Kingsland, Ferguson & Co		263 70	
	"	" H. C. Pierce & Co		96	
	18.	" invoice sundries		198 34	
	21.	" ochre		8 20	
	23.	" draft to W. F. Betts		52 54	
	"	" invoice bagging		1,483	
	24.	" cash to self		25	
	25.	" do. by express		1,000	
	30.	" do. to self		625	
Octo.	2.	" p'd dyeing dress		1 50	
	4.	" cash by express		500	
	"	" interest		271 33	
					19,303 00

CR.

Sept.	9.	By reclamation on corn		60	
	"	" " " flour		25	
	20.	" sales 3, 4 b. c		229 87	
	23.	" 6, 5 "		283 15	
	30.	" 8, 7 "		374 02	
Octo.	1.	" cash from I. M. R. R		30	
	6.	" sales 12, 1 b. c		56 88	
	"	" 13, 3 "		151 80	

28	18				
	Oct. 9.	By sales 14, 4 b. c.		212 98	
	12.	" 17, 14 "		779 98	
	" "	18, 19 "		1,006 19	
	14. "	26, 1 "		58 85	
	" "	107, 1 "		44 66	
					3,313 38
		Am't of debits	19,303 00		
		Balance due us Oct. 4, 1875			$15,989 62

E. & O. E.
St. Louis, Oct. 4, 1877.

J. H. DOWELL & CO.,
By H. T. NORCOM.

29 EXHIBIT C.

Mortgage with power of sale.

This indenture made this 25th day of April, 1876, between Clayborn S. Barron and William H. Brazzell, composing the firm of Barran & Brazzell, of the town of Hope, county of Hempstead, and State of Arkansas, as parties of the first part, and H. M. Mandeville and J. H. Dowell, composing the firm of J. H. Dowell & Co., of the city of St. Louis, county of Saint Louis, and State of Missouri, parties of the second part, witnesseth—

That for and in consideration of the sum of fifty dollars, the receipt of which is hereby acknowledged, the parties of the first part have bargained, sold, granted, and conveyed, and by these presents hereby bargain, sell, grant, and convey to the parties of the second part, their executors, administrators, and assigns, the following described real estate, with all appurtenances thereunto belonging, to wit:

Lots numbered one (1) and two (2), in block (27) twenty-seven, in the town of Hope, as shown by the plat now of record in said county of Hempstead, and State of Arkansas, to have and to hold the same
30 unto the parties of the second part, their executors, administrators, and assigns forever, conditioned, however, as follows: Whereas the said parties of the first part are indebted to the parties of the second part in the sum of eighty-four hundred forty-six and eighty-three one hundredths dollars ($8446.83), for which sum the said parties of the first part have executed their three promissory notes of equal sums, bearing date herewith, and due the 15th of October, November and December, respectively. Now if the parties of the first part shall well and truly pay to the parties of the second part the sum hereinbefore mentioned, and all other indebtedness which may then be due the parties of the second part by the parties of the first part, together with the costs of this trust, *or* on or before the (15th) fifteenth day of December, 1876, then this conveyance shall be void; otherwise to remain in full force and effect. And in case any default shall be made in the payment of said indebtedness, as herein set forth, or should the parties of the first part prior to said fifteenth (15th) day of December, 1876, sell, or attempt to sell, or otherwise dispose of the property
31 herein conveyed without the consent of the parties of the second part, then in either event the parties of the second part, their agent or attorney, is hereby authorized and empowered to take charge of said property on demand without process of law, and sell and dis-

pose of the same, or so much as may be necessary, at public sale at Hope Hempstead County, Arkansas, for cash in hand, upon two weeks' notice in some newspaper published in the county where said property is, or by written or printed notices posted in five conspicuous places near the property, at which sale any of the parties hereto may purchase as other parties, and out of the proceeds of said sale the said parties of the second part to retain the sums due them, as herein set forth, and the costs of this trust, and of sale, rendering the overplus, if any, to the said parties of the first part, their executors, administrator, or assigns.

Given under our hands and seals this the 25th day of April, 1876.

BARRAN & BRAZZELL.

STATE OF ARKANSAS,
County of Hempstead:

32 On this 25th day of April, 1876, personally appeared before me, a notary public in and for the above mentioned county, William H. Brazzell, surviving partner and representative of the firm of Barron and Bra'zell, composed of Clayborn S. Barron and William H. B razzell, and acknowledged that they, Barron & Brazell, by William H. Brazell, surviving partner, had executed the foregoing instrument for the uses and purposes therein mentioned and set forth.

In witness whereof I have hereunto set my hand and affixed the seal of my office, this 25th day of April, 1876.

[SEAL.] EMMETT C. FORT, *N. P.*

STATE OF ARKANSAS,
County of Hempstead, ss:

I, Thomas H. Simms, circuit clerk and ex-officio recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 27th day of April, A. D. 1876, at 12 o'clock m., and the same is now duly recorded, with the acknowledgment and certificate thereon, in record book,
33 volume 7, on pages 99 and 100.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in Washington, this 27th day of April, A. D. 1876.

[SEAL.] THO. H. SIMMS,
Clerk and Ex-officio Recorder.

(Copy.)

HOPE, ARKS., *April 25th*, 1876.

$2,815.61.]

On or before the 15th day of November, A. D. 1876, we promise to pay J. H. Dowell & Co., twenty-eight hundred and fifteen $\frac{61}{100}$ dollars, for value received, negotiable and payable without defalcation, or discount, and with interest from date until paid, at the rate of ten per cent. per annum, and without exemption from appraisement, valuation, or homestead laws.

(Signed) BARREN & BRAZELL.

(Written across the face:)
Protested for non-payment.
HOPE, ARK, *Nov.* 18, 1876.

J. F. FINLEY, *N. P.*

STATE OF MISSOURI,
County of St. Louis:

I, J. H. Dowell, a member of the firm of J. H. Dowell & Co., formerly composed of J. H. Dowell, and H. M. Mandeville, do solemnly
34 swear, that nothing has been paid or delivered towards the satisfaction of the above demand except as credited thereon, and that the sum of twenty-eight hundred and fifteen $\frac{61}{100}$ dollars, with interest from date, is justly due from the estate of C. S. Barron, deceased.

J. H. DOWELL.

Subscribed and sworn to before me this 22nd day of May, 1877.
[SEAL.] J. S. GARLAND,
Commissioner for Arkansas at St. Louis, Missouri.

Examined and disallowed July 21, 1877.

B. F. ASKEW,
Administrator.

HOPE, ARK., *April 25th*, 1876.

$2,815.]

On or before the 15th day of October, A. D. 1876, we promise to pay J. H. Dowell & Co., twenty-eight hundred and fifteen $\frac{61}{100}$ dollars for value rec'd. Negotiable and payable without defalcation, or discount, and with interest from date until paid, at the rate of ten per cent. per annum, and without exemption from appraisement, valuation, or homestead laws.

(Signed) BARREN & BRAZELL.

(Written across the face:)
Protested for non-payment.
Oct. 18, '76.
(Signed) J. F. FINLEY,
Notary Public.

35 STATE OF MISSOURI,
County of St. Louis:

I, J. H. Dowell, a member of the firm of J. H. Dowell & Co., formerly composed of J. H. Dowell and H. M. Mandeville, do solemnly swear that nothing has been paid or delivered towards the satisfaction of the above demand, except as credited thereon, and that the sum of twenty-eight hundred and fifteen $\frac{61}{100}$ dollars with interest from date, is justly due from the estate of C. S. Barran, deceased.

J. H. DOWELL.

Subscribed and sworn to before me this 22nd day of May, 1877.
[SEAL.] J. S. GARLAND,
Commissioner for Arkansas at St. Louis, Missouri.

Examined and disallowed July 21, 1877.

B. F. ASKEW,
Administrator.

HOPE, ARK., *April 25*, 1876.

36 $2,815.61.]

On or before the 15th day of December, A. D. 1876, we promise to pay to J. H. Dowell & Co. twenty-eight hundred and fifteen $\frac{61}{100}$ dollars, for value received. Negotiable and payable without defalcation or discount and with interest from date, until paid, at the rate of ten

per cent. per annum, and without exemption from appraisment, valuation, or homestead laws.

(Signed) BARRON & BRAZZELL.

(Written across the face:)
Protested for non-payment.
Dec. 18, '76. Hope, Ark.

J. F. FINLEY,
Notary Public.

STATE OF MISSOURI,
County of St. Louis:

I, J. H. Dowell, a member of the firm of J. H. Dowell & Co., formerly composed of J. H. Dowell and H. M. Mandeville, do solemnly swear that nothing has been paid, or delivered towards the satisfaction of the above demand, except as credited thereon, and that the sum of twenty-eight hundred and fifteen $\frac{61}{100}$ dollars with interest from date, is justly due from the estate of C. S. Barron, deceased.

J. H. DOWELL.

Subscribed and sworn to before me this 22nd day of May, 1877.
[SEAL.] J. S. GARLAND,
Commissioner for Arkansas at St. Louis, Missouri.

Examined and disallowed July 21, 1877. B. F. Askew, administrator.

37 Filed and writs issued August 22, 1877.
RALPH S. GOODRICH, *Clerk.*

38 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the 9th day of April, anno Domini, one thousand eight hundred and seventy-seven, at the United States court-room, in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on October 1, 1877.

J. H. DOWELL & CO.
v.
B. F. ASKEW ET AL.

Comes the defendant B. F. Askew, by Clark and Williams, his solicitors, and files herein his demurrer to the bill.

Which demurrer is as follows:

Comes Ben. F. Askew, as administrator of the estate C. S. Barran, and demurs to the bill; and states that the statements contained in the bill are not sufficient in law to entitle the plaintiff to relief, and for cause of demurrer show:

1st. Plaintiffs sue this defendant, as administrator, for liabilities and transactions of Brazzell as surviving partner, without showing such facts as would bind this defendant personally or as administrator.

2nd. This defendant could not bind himself personally to plaintiff for the debt, default, or miscarriage of another or for the debts or liabilities of his intestate, except in writing, and the plaintiff fails to aver that this defendant made any writing, and while this defendant, by

protestation, denies that he ever, expressly or jointly, made any agreement with plaintiffs, or caused or allowed the business to be carried on for the estate of Barron as for himself, submits to the court that
39 there is no such contract averred in the bill as will bind this defendant either in his individual or representative capacity.

3rd. The plaintiffs, by their bill, propose to charge the estate of defendants intestate for a business carried on by others after his death, and for which said estate is in no manner liable.

4th. The bill attempts to foreclose a deed of trust and to sell lands of said estate without showing any legal or equitable right therein, for Brazzell could have only bound himself and his own interest in said land by said deed, and the bill shows on its face that he had no interest in the land, and the effort to set up a parol contract between Barron Brazell for a one-half interest in said lots fails in this, that the contract and price and consideration is not averred, neither is any act of part performance of any contract set forth.

5th. Said bill is othewise defective, informal, and insufficient; wherefore he prays judgment.

CLARK AND WILLIAMS,
Attorneys for Defendants.

40 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, B. F. Askew, defendant in the above-entitled cause, do solemnly swear that the above demurrer is not interposed for delay so help me God.

B. F. ASKEW.

Subscribed and sworn to before me this 1st October, 1877.
RALPH S. GOODRICH, *Clerk.*

I, Sam. W. Williams, one of the counsel for defendant, hereby certify that I have examined the bill in the above-entitled cause, and in my opinion the demurrer of defendant B. F. Askew thereto, is well founded in point of law.

S. W. WILLIAMS.

Filed October 1st, 1877. Ralph S. Goodrich, clerk.

41 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the 22nd day of October, anno Domini one thousand eight hundred and seventy-seven, at the United States court-room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on Nov. 14, 1877:

Come the plaintiffs, by W. F. Henderson, their solicitor, and on motion of said solicitor it is ordered that W. P. Eakin be appointed guardian ad litem for the minor defendants herein.

And on November 24, 1879, as follows:

Come the complainants, by W. F. Henderson, their solicitor, and come the defendants, by Clark and Williams, their solicitors, and now

the court being well and sufficiently advised of the matters arising on the demurrer to complaint heretofore filed herein, and argued and submitted, considers that the same be overruled, and time is given the defendants herein to answer.

And on December 4, 1877, as follows:

Come the defendants Aubrey and wife, by U. M. Rose their solicitor, and file herein their answer and cross-bill.

Which answer and cross-bill, is as follows:

The separate answer of Mahala J. Aubrey and W. A. Aubrey her husband.

42 These defendants say that since the death of said Claiborne S. Barron, the defendant Mahala J., who was his widow, has intermarried with said Aubrey. The said defendant Mahala J., says that at the time of the occurrences mentioned in said bill she was a feme covert, and had no knowledge thereof, therefore she requires strict proof of the various allegations made in said bill of complaint. She denies, however, that she made any agreement with the said Brazzell and Askew; that the said Brazzell should continue to run the mercantile business formerly carried on under the firm name of Barron and Brazzell, and do any and all things in and about said business, which he, in his judgment, might think proper and necessary to wind up and close out said business to the best advantage of all parties interested, or anything of that sort.

Nor does the said Mahala J. know anything of the manner in which said business was carried on by said Brazzell as surviving partner of said firm, nor about the transactions between the plaintiffs and said Brazzell alleged in said bill.

43 These defendants make this answer a cross-bill against the said John H. Dowell, H. M. Maudeville, the plaintiffs in said bill, Benjamin F. Askew, as administrator of Claiborne S. Barron, deceased, W. H. Brazzell, Maggie M. Barron, Lint. L. Barron, Walter Barron, George Barron, and Oscar Barron, infant heirs of said Claiborne S. Barron, deceased, and would respectfully show to the court that the said Mahala J. Aubrey was duly married to the said Claiborne S. Barron, on or about the 4th day of September, 1860, and that she lived with him as his wife until his death, which occurred on or about the 4th day of October, 1875, and that during such coverture her said husband was seised of an estate in fee-simple in said lots numbered one and two, in block 27, in the town of Hope, county of Hempstead, and district aforesaid, and that she has never at any time relinquished her right of dower therein. Wherefore she claims that she is entitled to have her dower set apart to her in the said lots.

She therefore prays that said defendants to the cross-bill may
44 be required to answer the same, and that the court will cause her dower in said lots to be assigned to her, and for all other proper relief.

U. M. ROSE,
For Aubrey & Wife.

STATE OF ARKANSAS,
County of Hempstead, ss:

On this day appeared before me, a notary public for said county, W. A. Aubrey and Mahala J. Aubrey, his wife, who, being by me duly

sworn, made oath that the matters contained in the foregoing answer and cross-bill, so far as stated on their own knowledge are true, and so far as stated on the information received from others they believe them to be true.

W. A. AUBREY.
M. J. AUBREY.

Sworn to and subscribed to before me this 1st day of December, 1877.

In testimony whereof I have hereunto set my hand and affixed my official seal at Hope, this 1st day of December, 1877.

[SEAL.] EMMETT C. FORT, *N. P.*

45 Filed, and writs issued December 4th, 1877.

RALPH S. GOODRICH, *Clerk.*

And on December 7, 1877, the following proceedings were had:

Comes the defendant, B. F. Askew, as administrator, by Clark and Williams, esqs., his solicitors, and files herein his answer.

Which answer is in the words and figures following, to wit:

The separate answer of B. F. Askew as administrator on the estate of C. S. Barran, to the bill of complaint filed against him and others, by J. H. Dowell & Co., in this honorable court.

Said respondent, for answer to said bill or so much thereof as he is advised is material for him to answer, says: He admits that the plaintiffs are citizens of the State of Missouri and the defendants are citizens of the State of Arkansas, and believes it to be true that the complainants were cotton factors and commission merchants, as stated in their bill, in the year 1873. It is time that Claiborne S. Barran, who
46 is called Claiborn P. in complainant's bill, and Wm. H. Brazelle, in said year 1873, entered into partnership, and began business under the firm-name of Barran & Brazell, at the town of Hope, in the county of Hempstead, and it is true that said partnership was formed for the purpose of carrying on the business of a "general plantation supply business," but not a general mercantile business, as stated in the complaint. The terms and conditions of said partnership are more fully set forth in a paper hereto annexed, marked "A," which is a true copy of articles of partnership, and as such is prayed to be taken as part of this answer.

This defendant does not know how well it was known in St. Louis that deceased was possessed of large means, but such was the fact at the time said partnership was formed; and the said Brazell was of very limited means. Although it was agreed in said articles of partnership that the capital stock of the partnership should be put in equally by each of said partners, this respondent says the truth is that the deceased, Claiborn S. Barron, put into said partnership, at different times, the sum of nineteen thousand six hundred ninety-two and $\frac{42}{100}$
47 ($19,692.42), and only drew out during his lifetime, from said firm, eleven thousand one hundred twelve and $\frac{35}{100}$ dollars, leaving a balance due him of excess of capital put in by him, of eight thousand five hundred & sixty-five $\frac{07}{100}$.

Respondent, further answering, states that W. H. Brazell never complied with his agreement to pay in one-half of the capital stock in said firm, but only paid in the sum of $941.61, and then drew out of said

firm the sum of $4,340.64, leaving him indebted to the firm $3,399.03 dollars; and therefore respondent believes that the credit said firm acquired was owing to the means in the control and possession of said Barran.

Respondent believes there were business transactions had between the plaintiffs and the firm of Barran and Brazell to what extent and of what nature this respondent has no knowledge or information upon which he can form a satisfactory belief as to the same, his only source of information, outside of the said bill and the exhibits thereto, is that the surviving partner of Barron and Brazell, who is W. H. Brazell, informed this respondent, at the time of the death of said Barran,
48 or very soon thereafter, that said firm of Barron and Brazell was indebted to the complainants the sum of eleven thousand dollars. This statement was furnished this respondent on the 28th day of October, 1875, about 24 days after the death of deceased; and, as the accounts exhibited with the bill and the statements made by the surviving partner are contradictory, and said accounts are not distinct and clear at the death of said Barron as to the amount of indebtedness then due, this respondent denies the correctness of the same and asks the court to protect the interests of said estate and the minor defendants by requiring strict proof.

Further answering, this respondent admits that Claiborn S. Barron, departed this life, on or about the 4th day of October, 1875, intestate, and that on or about the 14th of the same month, this respondent was appointed administrator on his estate by the probate court of Columbia County, and is now acting as such. It is true the other persons mentioned in that behalf as defendants are the widow and heirs of the said Claiborn S. Barran.

49 At the death of C. S. Barran there was on hand a stock of goods worth about eighteen thousand dollars, estimated at cost, and accounts and notes due said firm, amounting to about twenty thousand dollars, which was assets amply sufficient to pay off all the liabilities of said firm and have a balance of about eleven thousand dollars left, as the said Brazell informed this respondent, the indebtedness of said firm was about $26,426.80.

And this respondent here avers and charges that said Brazell did not wind up and administer said partnership affairs as the law directs, but on the contrary wasted the same and without authority in law or in fact from this respondent, proceeded to carry on the business of said firm as the same had been carried on previous to the death of the said Barran, by buying and selling, and making new contracts and novating old ones in the name of the firm which had been dissolved. And these unlawful acts of said Brazelle were mainly induced, connived at, and encouraged by the complainants, who well knew or ought to have known that the said Brazell had no power to bind said firm, or the *the* estate
50 of said Barron. And this respondent utterly denies that he in any manner or form, by word, or act, as administrator or personally, ever authorized said Brazell to carry on the business of said firm as it had been carried on previous to the death of said Barran or do anything except what he was authorized and required by law as surviving partner to do and perform, which was to dispose of the stock on hand, on the best terms, collect the debts due to Barran & Brazell, and pay off existing liabilities, and all statements in complainants bill to the contrary are untrue, and especially is untrue that this respondent, Mrs. Barran, and W. H. Brazell ever had a conference in which it was agreed that the said Brazell should continue to run the business under

the firm name as before, and do any and all things which he in his judgment might think proper and necessary to wind up and close said business to the best advantage, &c., for the truth is, we three never had a conversation together in all time.

And this respondent never *never* made such agreement himself.

51 Furthering answering, states he does not know what information Brazell gave complainants as to the continuation of said business, but submits to this honorable court that it was the duty of the complainants to know the law; and that under the law a surviving partner had no such power, and under the administration laws of Arkansas this respondent could give him no more power than he had as surviving partner, and that all transactions they might have upon the dissolution of the firm by the death of Barron with W. H. Brazell was upon his own responsibility and could not be binding on the estate of C. S. Barron.

It is true cotton is the principal staple in the country where the business of the firm of Barran and Brazell was conducted. Respondent denies that it was necessary or proper for the complainants to have furnished cash to said Brazell to enable him to wind up the affairs of said partnership by collecting amounts due them from customers and disposing of the stock on hand and paying the debts. On the contrary respondent avers and charges that said cash advances was a decided detriment to the interests of said firm, because it induced the

52 said Brazell to neglect the appropriate and the regular means of closing up the business of said firm, and incited and induced him to launch into new ventures and speculations, which he did in the name of the firm without authority, by becoming a general cotton speculator, by purchasing at enormous prices and rates, and purchasing generally without regard to the fact that the parties were customers, and had any balances coming to them on account cotton purchased or not, after paying their debts due the firm; and so that by means of this reckless system of dealing so induced by the complainants advancing cash. On the 1st day of June, 1876, less than eight months after the death of said Barran said Brazell had collected and disposed of all of the said assets of the firm, which amounted to about thirty-eight thousand dollars at the death of Barron, excepting $10,523.62 dollars, and was indebted in the sum of $11,720.03, leaving a deficiency of $1,196.41, which showed the result of the said eight months' business to have been to bring the concern out $1,196.41 worse than

53 nothing; which showed an actual waste and misappropriation of the difference between $26,426.80, the amount of indebtedness at the death of Barron, with 8 months' interest added, and the sum of $38,000, which was the amount of assets on hand at said death, with the sum of $1,196.41 added thereto, not counting interest on the assets, which makes an actual waste of 12 or 13 thousand dollars.

Respondent is, therefore, unable to see how such transactions can be of any benefit to the estate of deceased, as is alleged in the complainants' bill, or what equitable claims the complainants have against the estate of his intestate.

Respondent admits that the indebtedness of the firm at Barron's death exceeded $25,000, but denies that at the close of the business that the claims against the firm did not exceed $10,000, and respondent avers that, had the business been properly managed, all of the indebtedness should have been cancelled, and, in point of fact, plaintiffs' debt or claim was paid or novated by said Brazell.

Respondent denies that it was through the aid furnished by

54 the complainants that any considerable amount outstanding and due said firm was collected, and, on the contrary, says said pretended aid was a decided injury, as above stated.

This respondent denies that the advances made by the plaintiffs were and in good faith by said Brazell in conducting the business for the purpose of winding up the business of said firm.

Respondent does not know, except from the statements of said bill and said Brazell, how much was due the plaintiffs from said Brazell on the 15th of April, 1876, at the time of said settlement, but denies that any such balance constituted a just debt against Barran & Brazell, but was the individual liability and obligation of said Brazell, as the complainants had dealt with him alone in all of said transactions, and he had adjusted and settled with complainants all balances due at the death of Barron, and if there was any final balance at the close of their dealings, it was the result of new transactions since the death of Barron, and as the said Brazell had exhausted $38,000 of the assets
55 of said firm, and $1,196.41 in excess in carrying on said new business, the complainants have no equitable claim upon the assets of said firm beyond the interests of said Brazell or upon the estate of said Barran.

Respondent further answering, admits that said Brazell executed the mortgage as set forth in the bill, but this respondent denies that said Brazell had any authority whatever to execute said mortgage, and denies that said lots were the property of said firm; on the contrary, said lots were the individual private property of said Barran at the time of his death, and the legal title and possession thereof was in him.

Respondent is informed and believes that it is untrue that there was any agreement, by parol or otherwise, to convey said lots to said firm made by the said Barran in his lifetime; said firm had no title to said lots either in law or equity, and all the statements in said bill to the contrary are untrue.

Further answering this respondent says it is true that he claims all the liabilities of Barran & Brazell, at the time of Barron's death,
56 have been settled by subsequent large shipments of cotton made by Brazell; and this respondent avers the truth to be that said Brazell shipped to the complainants, after the death of Barran, one thousand and seventy-two bales of cotton, which was sold for, by them, the sum of $54,437.72, which was enough to pay nearly five times the sum due them at the death of Barron, and this cotton was purchased largely with the assets of said firm on hand at the death of Barron, and this use of the assets of said firm was well known to complainants and encouraged and connived at by them; and this respondent submits that the complainants, having thus realized out of the assets of said firm on hand at the death of Barran, a sum largely in excess of the indebtedness due them at said time, have no equitable claim against the balance of said assets, or the estate of said C. S. Barron, for any balance found due against the said Brazell, in new transactions involving some 70 or 80 thousand dollars, and for such balances the said Brazell is alone liable, and had no right or power to bind the interest
57 or estate of said C. S. Barron therefor, by mortgage or otherwise.

Respondent here again denies that he ever gave, in any way, any authority to said Brazell to manage said partnership affairs, otherwise than he was authorized by law, and denies that he was ever often in

the storehouse or knew anything, except in a general way, of the manner of his conducting the business.

Respondent knew the law gave said Brazell the right, as surviving partner, to wind up the affairs of the partnership, and this respondent had no right to interfere except in cases of mismanagement and waste, and that he had no knowledge or means of knowing that waste or mismanagement was going on under the management of Brazell until some time after it had commenced.

It is true this respondent took cognizance of the management of Brazell in so far as to do his duty as administrator, in seeing there was no waste. It was some months after the death of Barran before he suspected that Brazell was committing waste, and after having his suspicion aroused this respondent set about getting up sufficient
58 evidence to establish the fact, as this respondent did not feel justified in commencing extraordinary proceedings, such as were necessary, and entering into bonds for an injunction and the appointing a receiver, without sufficient evidence to sustain him; but so soon as this respondent had fully ascertained the facts he, as administrator, at once instituted a suit against said Brazzell on the chancery side of the circuit court of Hempstead County, and prayed therein for the appointment of a receiver to take charge of the assets of said firm and winding up its affairs. Said bill was filed in the month of June, 1876, and there was by said court a receiver appointed, who took charge of all the assets of said firm and now has the control and management thereof. And respondent prays leave to exhibit a copy of the proceedings in said cause, or so much thereof as may be necessary, to show the pendency and objects of said suit, and here sets up said proceedings in bar of this action, and avers that the chancery court of Hempstead County had jurisdiction, custody, and control of all the assets and affairs
59 of said firm at the time this suit was instituted, and prays the benefit of the said matters, by way of answer, as fully and completely as though the said matters had been specially interposed by plea.

Further answering, this respondent says he does not know except from complainants statement how they kept their accounts or entered their credits, but submits that they had no right to hold the interest of the estate of Barron liable for any final balance due for or on account of new dealings with Brazell.

Respondent denies that the advances made to Brazell of money, bagging, ties, and provisions by the complainants went largely to swell the funds out of which the debts were in fact paid, upon the contrary, it induced the lessening of the said funds as above stated.

This respondent denies that any action or conduct on his part induced the complainants to come thus to the rescue, as they claim, but which respondent avers was to the injury and ruin of said estate.

And respondent believes and charges the truth to be that the motives which induced the complainants to make advances to Brazell, was
60 to make the profits by way of interest and commissions on the advances and sales; and the charge and statement of the bill that these advances were induced by this respondent and Mahala J. Barran, is an after thought, (which has been brought about by reason of the insolvency of W. H. Brazell) for the complainants never consulted with this respondent and never communicated with him in relation to making said advances, although they knew his residence and that he was the administrator on the estate of deceased, of which complainants were informed by this respondent by letter, bearing date about the 4 of Novem-

ber, 1875, in which letter this respondent inquired what steps Brazell was taking to pay off the indebtedness of the firm of Barran & Brazell.

It is true there is a brick store-house on the lots pretended to be mortgaged by Brazell to the complainants, but it is not true that the warehouse is on said lots, but on the contrary said warehouse, as this respondent is advised and believes, and so states the fact to be, is on lot No. three, in said block No. 27.

It is true this respondent is in possession of all of said property
61 as administrator as aforesaid as he insists he has a right to be.

And it is further true that the rents for the same amount to and are worth one thousand dollars.

This respondent denies that the cost of the brick store-house was $8,000, but is informed and believes the cost did not exceed $7,000. It may be true, but of this respondent is not well informed, that said house was paid for in part out of the assets of said firm with which deceased was properly chargeable, but respondent denies that said buildings were put up as partnership property. And as the partnership was to end by its own terms about the time the buildings were to be completed, he is led to believe they were not intended for partnership use, and from this and other conversations hereinafter stated, this respondent denies that said buildings were put up as partnership property, for the reason the building contract was drawn up by a person not a lawyer, in the name of Barran & Brazell, and when presented to C. S. Barron for his signature he then and there stated that it was C. S. Barron's con-
62 tract and not the contract of Barran & Brazell, and said he supposed it made no difference as it was a matter of form, and thereupon signed the contract, stating distinctly it was his business and the same was so understood by the contractors. The said warehouse was built on lot No. 3 subsequent to the death of deceased.

It is not true that the store-house was completed at the death of Barron, but was completed a short time thereafter. It is true that after the completion of said store Brasell moved the goods into the same.

Respondent denies that said removal was in pursuance of any agreement made by his intestate agreeing to make any deed to said firm for said lots.

This respondent denies that any statement in complainants' bill, alleging his intestate, ever agreed to make any deed to the property mentioned is true. As the firm was so largely indebted to deceased, and Brazell had drawn out so much himself and was so largely debtor to the firm, it was not likely, or reasonable, that demand would have to get the consent of Brazell by making any such promises, and by this means said Barron was only collecting his own debt out of said firm and put it in his own name.

63 Respondent, further answering, here again denies that his intestate ever agreed to convey said Brazell one-half interest in said lots, and denies that said storehouse and warehouse were used for partnership purposes before the death of C. S. Barron.

It is not true that said lots only cost deceased $300. Lots No. 1 & 2 cost $400, as shown by the deed to the same, and this respondent is informed and believes, said deceased paid the further sum of about $800 for a house, and claim on said lots. Lot No. 3, on which the warehouse is built, cost the sum of three hundred dollars, as the papers belonging to deceased shows he paid $100 on the same in his lifetime, and this respondent has paid for said estate $200 since then, but to this lot complainants have set up no claim, but do claim the warehouse thereon.

Further answering, this respondent says, it is true the purchase-money for said lots was not paid by said Brazzell, but it is not true that the same was to have been charged to his account on the books of the firm, for the simple reason, no such agreement was ever made, and no price was set upon said lots; and this respondent declines to ac-
64 cept the generous proposition of the complainants to pay one-half the price given for said lots.

It is true the complainants presented the notes sued on herein, "signed Barran and Brazell," which was made by Brazell after the death of Barran, before the expiration of two years from the date of respondent's letters of administration, and that this respondent disallowed the same, because he did not regard the same as a debt of his intestate's; and this respondent denies that his intestate is indebted to complainants in any sum, because, he states, that said complainants had received out of the assets of said firm, on hand at the death of said Barron, a sum largely in excess of the balance due from said firm, and all new dealings had with said Brazell after the death of said Barron was upon the sole responsibility of said Brazell, and by dealing with him and taking his notes for a final balance, all the past transactions of the said firm were settled, and said notes and contracts and balances became the sole debt of the liability of the said Brazell, who had no right, power, or authority to bind said Barran or his
65 estate; and this respondent charges the truth to be, that the said notes of the said Brazell, so signed as aforesaid, were taken and received by the complainants in liquidation and novation of all the past transactions of said firm.

Having fully answered all the allegations in the complainants' bill, this respondent prays that upon a final hearing of this cause he may have the benefit of a demurrer, and that he be hence dismissed with his reasonable costs expended.

CLARK & WILLIAMS,
For Defendant.

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

B. F. Askew, one of the defendants herein, being duly sworn, says that all the facts stated on his own knowledge in the foregoing answer are true, and those stated upon the information of others he believes to be true.

B. F. ASKEW.

Subscribed and sworn to before me the 5th day of December, 1877.
[SEAL.] T. P. MARTIN, *N. P.*

Notary's cost, .50, paid by defendant.

66 *Exhibit A, to ans.*

Articles of agreement made and executed this 3rd day of October, 1873, by and between C. S. Barron, of Magnolia, Arkansas, and W. H. Brazzell, of Hope, in the county of Hempstead, Arkansas:

Whereas, it is the intention of the said parties to form a co-partnership for the purpose of carrying on and conducting a general plantation supply business at Hope, in said Hempstead County; for which purpose they have agreed on the following terms and articles of agreement, to the faithful performance of which they materially bind and engage themselves each to the other, his executors and administrators.

1st. The style of said partnership shall be "Barran and Brazell," and it shall continue for the term of two years from the above date, except in case of the death of either of said parties within the said time, or unless sooner dissolved by the mutual consent of said parties.

2nd. The capital stock of said partnership shall consist of three thousand dollars, to be furnished equally by said parties in cash, save that the storehouse now owned by said Brazell in said town of Hope shall be taken and purchased by said partnership at the
67 sum of five hundred dollars; and provided further, that any addition to said stock may be made out at any time by mutual consent.

3rd. All profits which may accrue to the said partnership shall be divided, and all losses happening to said firm from whatever causes or accidents and all expenses of business shall be borne by the said parties in equal shares.

4th. That each of said parties shall devote and give all their time and attention to the business of said firm and each to have equal authority in the management of the business, provided that in case of disagreement the one opposing, or in the negative shall have the controlling voice.

5th. All the business transactions and accounts of said firm shall be kept in regular books which shall always be open to the inspection of each of said parties and their legal representative respectively. An account of the business and an inventory shall be taken and an account between said parties shall be settled as often as once in each year and as much oftner as either partner may desire and in writing
68 request.

6th. Neither of said parties shall subscribe any bond, sign or endorse any note, of hand, accept, sign or endorse, any draft or bill of exchange, or assume any liability verbal or written in the name of the firm for the accommodation of any other person or persons whatever, without full consent of the other party. Nor shall either party lend any of the funds of the partnership without such consent of the other first had and obtained.

7th. No purchase of merchandise, wares or other things of any considerable amount, nor any transaction in the firm name out of the usual course of the "general plantation supply business" shall be made or undertaken by either of the parties without previous consultation with, and approbation of the other.

8th. Neither partners shall at any time withdraw from the joint profits more than his share of the profits of said business than earned and collected.

9th. At the expiration of the aforesaid term or earlier dissolu-
69 tion of this co-partnership if the said parties or their legal representatives cannot agree in the division of the partnership effects and accounts then on hand, they shall leave the same to be divided by one abitrator if they can mutually agree upon the same person, if not, then to three to be solicited in the usual manner.

For the purpose of securing the performance of the foregoing agreements it is agreed that either party may in case of the violation of them or any of them, have the right to dissolve this co-partnership forthwith, on his becoming informed of such violation.

In witness whereof, we, the said C. S. Barron and W. H. Brazell, have hereto set our hands the day and year above written, as well as unto

a duplicate of the same, either of which may be taken and considered as the original.

Attest:

OSCAR D. SCOTT.

Filed December 7, 1877. Ralph S. Goodrich, clerk.

70 And on January 31st, 1878, the following proceedings were had.

Come the defendants Maggie M. Barron, Lint. L. Barron, Walter Barron, George Barron, and Oscar Barron by W. P. Eakin their guardian ad litem, and files herein their answer, and come the plaintiffs by Henderson and Caruth their solicitors, and file herein their answer to the cross-bill of Mahala J. Aubrey, and also Exhibits A B & C to their application for a receiver.

Which answer of infant defendants is as follows:

Maggie M. Barron, Lint. L. Barron, Walter Barron, Geo. Barron, and Oscar Barron, infant defendants herein, by W. P. Eakin their guardian ad litem, come and defend, and for answer say, they admit all that is alleged in the original and cross-bill, to their advantage and benefit, and deny all that is alleged therein, to their disadvantage and prejudice. They say they are infants of tender years and ask the protection of the court.

MAGGIE M. BARRON,
LINT. L. BARRON,
WALTER BARRON,
71 GEORGE BARRON,
OSCAR BARRON,
By W. P. EAKIN,
Their Guardian ad litem.

Filed January 31, 1878, Ralph S. Goodrich, clerk.

And which answer of J. H. Dowell & Co. to cross-bill of Mahala J. Aubry, is as follows:

Plaintiffs, by way of answer to the cross-bill of Mahala J. Aubrey, late Mahala J. Barron, say, they deny that she, the said Mahala J. Aubrey, is entitled to dower, in the lots in said cross-bill set out, because they say, the same was partnership property bought, paid for, and improved out of the partnership funds of the firm of Barron and Brazell, and bought, paid for, and improved for partnership use and occupation in the transaction of the mercantile of the said firm of Barron and Brazell.

HENDERSON & CARUTH,
Solicitors for Plaintiffs.

Filed January 31, 1878. Ralph S. Goodrich, clerk.

72 And on March 20th, 1878, the following proceedings were had:

Come the complainants, by Henderson and Caruth, their solicitors, and file herein their replication to the answer of B. F. Askew, as administrator, and also file the bond of the receiver herein.

Which replication is as follows:

Plaintiffs come, and by way of replication to answer of B. F. Askew, administrator of C. S. Barron, deceased, say they deny all and singular the allegations in the said answer inconsistent with the statements of the bill, and reaffirm and reallege all the allegations of the bill, because

the same are true in every particular. They pray as in the original bill.

HENDERSON & CARUTH,
Solicitors for Plaintiffs.

Filed March 20th, 1878. Ralph S. Goodrich, clerk.

73 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered, that at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the 28th day of October, anno Domini one thousand eight hundred and seventy-eight, at the United States court-room, in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on January 25, 1879:

Come the plaintiffs, by Henderson & Caruth, their attorneys, and also come the defendant C. E. Mitchell, by Clark & Williams, their attorneys, and shows to the court that B. F. Askew has resigned the administration of the estate of C. S. Barron, and that he has been appointed administrator de bonis non, and prays leave to be made a party defendant, and for leave to file an amendment to the answer of Askew, and to adopt the same. It is ordered that said C. E. Mitchell, as administrator de bonis non, be made a party defendant, and that he have leave to adopt and amend said answer, and thereupon he files his amendment to answer setting up the statute of frauds. Thereupon said defendant filed exhibit to the answer, also a motion to suppress certain depositions of plaintiffs specified in the motion, and by consent it is ordered that the replication heretofore filed be taken as a replication to the amendment.

Which motion to be made party is as follows:

Comes C. E. Mitchell as administrator de bonis non of the estate of C. S. Barron, and prays leave to be made a party to this suit, and hereby adopts the answer of B. F. Askew, heretofore filed, and
74 asks leave to state by way of amendment to said answer that the contract set up in the bill of complaint, if any such contract was made whereby it is averred that C. S. Barron agreed to convey lots one and two in said block twenty-seven, to the firm of Barron and Brazell, was by parol, and this defendant sets up and relies upon the statute of frauds, and pays the benefit of the same as fully as if set up plea.

CLARK AND WILLIAMS.

Filed January 25, 1879. Ralph S. Goodrich, clerk.

Which motion to suppress certain depositions is as follows:

Comes defendant C. E. Mitchell as administrator de bonis non, and moves to suppress all those portions of the depositions of J. H. Dowell, taken at the office of Charles D. Green, jr., in St. Louis, on the 16th day of February, 1878, as refers to any transactions with Barron, because he is a party to the suit, and as to Barron, this is a suit
75 against an administrator and said J. H. Dowell has not been called upon to testify by us nor has he been required to testify by the court.

Defendant also moves to suppress all that part of the deposition of J. Dowell, which refers to statements made by Brazell to the effect that Mrs. Barron had taken the administration on the partnership; and the letters of Brazell exhibited with said deposition be suppressed and

stricken from the files in this case, as none of the matter so stated, nor are any of said exhibits competent evidence against this defendant or in the cause, also to suppress the clause in the deposition of J. H. Dowell, to wit:

"A large amount of money advanced by us to Barren & Brazell after the death of Barron was used by Brazell as surviving partner, to pay off the debts of the old firm as is shown by letters attached as follows:" Also to suppress and strike from the files said letters, as Brazell is a competent witness to these facts, and all these statements are heresay and incompetent testimony, als' all statements of said Brazell made to this witness as to his purpose in drawing money, and as to the uses he intended to put it to.

76 The said defendant also moves to suppress so much of the depositions of Henry T. Norcum, taken at the same time and place as refers to letters and statements of Brazell as to Mrs. Barron continuing in the firm. Also to suppress all that part of the deposition of said witness which referred to what Mr. Lowry expected as to the settlement with Brazell.

Also to suppress all the statements of said witnesses to the effect that he understood that all the advances which J. H. Dowell & Co. made to Barron & Brazell to Brazell as surviving partner, after Barron's death, were made for the express purpose of assisting Brazell as surviving partner to pay the pressing debts of the old firm of Barron & Brazell.

CLARK & WILLIAMS.

Filed January 25, 1879. Ralph S. Goodrich, clerk.

Which exhibit is as follows:

77 *Complaint in equity.*

In Hempstead circuit court. In chancery. Before the honorable James K. Young, judge.

Hempstead circuit court. To the fall term, A. D. 1876.

STATE OF ARKANSAS, *County of Hempstead:*

BENJAMIN F. ASKEW, AS ADMINISTRATOR OF Claiborne S. Barron, deceased,
against
WILLIAM H. BRAZELLE, AS SURVIVING PARTNER of the late firm of Barron & Brazell.

(Here follow the bill and record entries in said cause, which are omitted by agreement of parties, except the following endorsement of bill:)

At chambers, in the town of Washington, Hempstead County, State of Arkansas, June 20th, 1876.

78 I have this day examined the within complaint, and am of opinion that the prayer thereof in regard to the appointment of a receiver, with necessary powers and authority, and the issuance of the restraining order and injunction, temporarily, should be granted.

It is therefore considered and ordered by me that Charles E. Trimble be, and he is hereby, appointed a receiver until the further order of the Hemstead circuit court to take charge of all the assets belonging to the said late firm of Barron & Brazell, with full power and authority to collect all debts due said firm, and whenever and wherever necessary to bring suits to enforce such collection, to rent the wooden store-house belonging to said firm situated on lot numbered four (4) in block numbered twenty-eight (28), in the town of Hope, in said county of Hempstead, and to collect all rents now due, and which may hereafter be due, for the same, to sell the stock of merchandise now on hand belonging to said firm, either at private sale in the usual course of merchants or at public auction, as may in the opinion of such receiver be for the best interests of said firm, but altogether for cash in hand, so
79 that the whole of the same be entirely disposed of by the first day of October next; but before entering upon the discharge of his duties, said receiver must be sworn to perform them faithfully, and with one or more sureties, to be approved by me, execute a bond to the plaintiff and defendant in this cause in the sum of ten thousand dollars to the effect that he will faithfully discharge the duties of receiver in this action, and obey the orders of the court therein; and said receiver will make full report of all his acts and proceedings to the next term of the Hempstead circuit court.

And it is further considered and ordered that the said defendant, William H. Brazell, and his clerks, agents, and attorneys, be and they are hereby restrained and enjoined, until the further order of the Hempstead circuit court, or of the judge thereof, from further interference with the assets or affairs of said late firm of Barron & Brazell, and from the further use of said firm name for any cause whatever, and that he and they are hereby commanded to immediately turn over and deliver to the receiver herein appointed all of the assets belonging to said late firm of every nature, kind, and description, including all cash, notes, accounts, and other evidences of indebtedness whatever; and the clerk of the Hempstead circuit court is directed to issue this order of injunction in the manner prescribed by law; but before the same become effectual, the plaintiff in this cause shall give security in a bond, conditioned as required by law, in the sum of fifteen hundred dollars, to be approved by the clerk of the Hempstead circuit court.

Given under my hand as judge of the ninth judicial circuit of the State of Arkansas, on the date first above written.

JAMES K. YOUNG,
Judge of the 9th Judicial Circuit of the State of Arkansas.

And also the following order:

STATE OF ARKANSAS,
County of Hempstead:

Be it remembered, that at a circuit court begun and held in and for the county of Hempstead, in *in* the State of Arkansas, at the court-
81 house in the town of Washington, in said county, on Monday, the 31st day of December, A. D. 1877, *it being the 17th Monday of the 1st Monday in September of said year*, and the day fixed by law for the holding of said court. Present and presiding, the honorable James K. Young, judge of the 9th judicial circuit, composed of the counties of Miller, Lafayette, Columbia, Union, Calhoun, Ouachita, Nevada, and Hempstead. Court was proclaimed open, and the following proceedings were had on the equity side of said court.

Afterwards, on Wednesday, January 16th, 1878, a day of the same term of said court, the same judge presiding, the following, among other proceedings, were had, to wit:

BENJAMIN F. ASKEW, AS ADM'R OF THE ESTATE of Claiborne S. Barron, dec'd,
vs.
WILLIAM H. BRAZELL, AS SURVIVING PARTNER of the late firm of Barron & Brazell.

Now on this day comes the said plaintiff, Benjamin F. Askew, as administrator of the estate of Claiborne S. Barron, deceased, and it appearing to the court that the said defendant hath been duly
82 and in due time notified of the pendency of this action, and that he hath wholly failed to appear and plead, answer, demur, or otherwise make defense herein.

It is therefore adjudged, considered, and decreed by the court that the complaint herein and all the material allegations thereof be, and the same are hereby, taken as true and confessed against the said defendant. Whereupon this cause comes on to be heard upon the said complaint herein, and the exhibits thereto and upon the two reports of Charles E. Trimble, as late receiver herein, heretofore filed and approved by the court, and upon the report of Robert B. Williams, the late special master heretofore appointed for the purpose of making inquiry and ascertaining who are the unpaid creditors of said firm of Barran & Brazell, which report has been heretofore filed and approved by the court.

And the court finds from said complaint, exhibits, and said reports that the said William H. Brazell and the said Claiborne S. Barron, deceased, on the 3rd day of October, A. D. 1873, formed a partnership, under the firm-name of Barron & Brazell, for the purpose of car-
83 rying on a general plantation, supply business, at the town of Hope, in Hempstead County, Arkansas, to continue for two years, unless sooner dissolved by death or mutual consent; that by the terms of said partnership its capitol stock was to consist of three thousand dollars, in cash, to be furnished equally by said partners, which might be increased at any time by mutual consent, and that the said firm were to purchase from the said defendant Brazell, at the sum of five hundred dollars, a store-house then owned by him in said town of Hope, and that all the profits were to be divided and the losses borne by the said partners in equal shares; and the court further finds from said complaint, exhibits, and reports that the said firm immediately purchased from said defendant Brazell, the said store-house in said town of Hope, for the sum of five hundred dollars, and also purchased a stock of goods and went into business under the said partnership in said house and continued the same until the death of the said Claiborne S. Barron; and the court further finds from said complaint, exhibits, and reports that the said Claiborne S. Barron departed this life intes-
84 tate on the 4th day of October, A. D. 1875, and that on the 14th day of October, A. D. 1875, letters of administration, legally and in due form of law, were granted to the said plaintiff by the probate court of Columbia County, Arkansas, and that the said plaintiff then and there took upon himself the trust and burthen of said administration, and is still in the exercise of said trust and administration, under and by authority of said letters; and the court further finds from said complaint, exhibits, and reports that said partnership was dissolved by

the death of the said Claiborne S. Barron on the 4th day of October 1875, and that the assets of said partnership at the time of said dissolution amounted to not less than twenty thousand dollars in notes and accounts and other evidences of debt, and eighteen thousand dollars in merchandise on hand amounting in the aggregate to not less than thirty-eight thousand dollars, and the said wooden store-house in the town of Hope, situated on lot numbered four, in block numbered twenty-eight, in said town of Hope, and that said store-house at the time of the dissolution of said partnership and is now worth the sum
85 of one thousand dollars; and that at the time of the dissolution of said partnership the liabilities of said firm amounted to the sum of twenty-six thousand four hundred and twenty-six dollars and eight cents; and the court further finds from said complaint, exhibits, and reports that after the dissolution of said partnership, the said defendant Brazell continued to carry on the business of said partnership, and to use the name of said firm, and to sell the property and collect the debts of said firm, and to make other purchases, and generally to take upon himself all authority in the matter, the same as in the life-time of the said Claiborne S. Barron, deceased, and as if said partnership still existed; and the court is of the opinion and further finds that under the law the said defendant had no authority or right to carry on said business of said partnership after the death of the said Claiborne S. Barron, and that the assets of said firm are not liable for and ought not to be charged with any debt or liability created by the said defendant after the dissolution of said partnership in the name of the said firm or
86 otherwise; and the court is further of the opinion and finds that should the master hereinafter appointed upon a full examination, ascertain that the said firm or business of Barron & Brazell has sustained any loss or damage whatever by reason of the said defendant Brazell continuing to carry on said partnership after the death of said Barron, as aforesaid, the said loss or damage whatever it may be, shall be charged solely and wholly against the said defendant William H. Brazell, and no part thereof shall be charged or allowed against the estate of the said Barron, or the plaintiff herein; and the court further finds from said complaint, exhibits, and reports, that a part of the debts justly owed by said partnership at the time of the dissolution thereof, were never paid by the said defendant and have been ascertained and paid under the orders of this court by the said Charles E. Trimble, as receiver herein, out of the assets of said partnership turned over to him as such receiver; and that said debts so paid by said receiver; including interest up to time of such payment, amount in the aggregate to the sum of seven hundred and sixty-four dollars and ninety-four cents
87 ($764.94). And the court further finds from said complaint, exhibits, and reports that all the debts due and owing by said partnership at the time of the dissolution thereof have been paid off and discharged, and that after the payment of said debts and the costs and expenses of this action up to the present time, the remaining assets of said firm exclusive of said wooden store-house, amount to the sum of eleven thousand three hundred and eighty-five dollars and ninety-four cents ($11,385.94), consisting of nine thousand two hundred and three dollars and eighty-three cents, ($9,203.83), in uncollected open accounts, one thousand three hundred and thirty-four dollars and seventy cents ($1,334.70) in uncollected notes, and eight hundred and forty-seven dollars and forty-one cents ($847.41) in cash; and the court further finds from said complaint, exhibits, and reports, that the capital stock paid into said firm during its continuance by the said Claiborne S.

Barron, deceased, amounting to not less than fifteen thousand dollars and probably to the sum of twenty thousand dollars or more, and that the capital stock paid into said firm during its continnance by the said defendant amounts to not more than two thousand dollars, in-
88 cluding said wooden storehouse at the valuation of five hundred dollars; and the court not being sufficiently advised and informed by anything now before it as to the state of accounts between the said defendant and the estate of the said Claiborne S. Barron, deceased, in the matter of the said partnership or as to the indebtedness of either to said partnership at the time of the dissolution thereof, or as to other matters, properly to be passed upon, therefore the court finds and it is of the opinion that a special master in chancery ought to be appointed herein to take and state an account between the said defendant and the said estate, as to the matters of said partnership.

It is therefore considered, ordered, adjudged, and decreed by the court that Frank M.Thompson be, and he is hereby, appointed special master in chancery herein, and that this cause be and the same is hereby referred to him to take, audit, and state an account between the said defendant and the estate of the said Claiborne S. Barron, deceased, as to the matters of said partnership, and the said master be, and he is hereby, ordered and instructed to ascertain as nearly as he can, what
89 amount of the assets of said partnership the said defendant has not either turned over to the receiver herein, or appropriated to the payment of the debts of said partnership existing at the time of the dissolution thereof, and charge the same to said defendant, if any in said account including the rents received by said defendant for said wooden store-house since the dissolution of said partnership. And the said master is further ordered and instructed to ascertain as nearly as he can, what amount if any of the notes and accounts and other evidences of debt due to said partnership turned over by said defendant to said receiver Charles E. Trimble, were collected by the said defendant, after the dissolution of said partnership, and before they were so turned over, and charge the same to said defendant in said account, and deduct the same from the amount of assets as ascertained and found by the court in this decree as now belonging to said partnership, and the said master is further ordered and instructed to ascertain as nearly as he can, the amount of the account from said defendant to said partnership as shown upon the books thereof, or otherwise, and
90 charge the same to said defendant in said account, and also the amount of the account of said Claiborne S. Barron, deceased, to said partnership as shown by the books thereof, or otherwise, and charge the same to the estate of said Barron in said account; and the said master is further ordered and instructed to ascertain the capital stock put into said partnership by said defendant, and the said Barron, deceased, respectively and any time before the dissolution of said partnership, and to credit each of them in said account with the amount so put in by him; and the said master is further ordered and instructed to ascertain as nearly as he can, the amount of assets now properly belonging to said partnership and to charge and credit each of said partners with the proper amounts for and against him, taking into consideration all matters necessary to the taking, auditing, and stating justly and properly an account between partners; and to report and show in said account, what amount if anything is due to said partners, or either of them, and also what amount if anything is due from either of said partners to the other upon final settlements after all proper credits

91 and charges, so as to make it a full and complete account between said partners and for the purpose of taking, auditing, and stating said account, the complaint in this action, and the two said reports of Charles E. Trimble, as receiver herein, and the said report of Robert B. Williams, as master in chancery herein, and this decree together with the other papers on file herein, are hereby referred to said master to be by him examined and considered in stating said account; and in stating said account the said master is further instructed to be governed by the findings of this decree as far as they are definite and certain, and the said master in taking and stating said account is hereby further ordered, instructed, and authorized to take the depositions of all such witnesses and hear such other evidence as may be named or desired by either party hereto and consider the same in stating said account, and the present receiver herein John P. Hervey, is hereby ordered and directed to produce all the books and papers pertaining to said partnership in his possession or under his contract before said master, whenever required by him to do so, which said books shall be care-
92 fully examined and particularly considered by said master in stating said account; and the said master is hereby further ordered and directed to appoint some suitable time and place (with authority to adjourn from day to day) for taking, auditing, and stating said account, and to give to each party to this cause reasonable notice; not less than ten days of such time and place, which time shall be before the first day of the next term of this court; and it is further ordered that all the rights of the parties hereto as they now stand, except in so far as are settled by this decree be and they are hereby reserved for the further consideration of this court; and the said master is further ordered to report his action herein at the next term of this court on or before the third day thereof; and it is further ordered that a copy of this decree be furnished by the clerk of this court to said master with the other papers on file herein. And this cause is continued, and F. M. Thompson is sworn as master in open court.

This transcript is duly certified by the clerk of Hempstead County.

93 And on February 5, 1879, as follows:

This cause came on to be heard at this term and was argued by Henderson and Caruth, solicitors for plaintiffs, and Clark and Williams, solicitors for the defendant C. E. Mitchell, and by U. M. Rose, solicitor for the defendant Margaret Barron, and thereupon upon consideration thereof it was ordered, adjudged, and decreed as follows, viz: That the real estate described in the plaintiff's bill and alleged to be partnership property of the late firm of Barron & Brazell was not the property of said partnership, but was the individual property of C. S. Barron one of the members of said firm, and that M. H. Brazell, as surviving partner of the said firm of Barron & Brazell, had no right or authority to execute the mortgage mentioned in plaintiff's bill on said property, and that said mortgage deed was void and of no effect, and so much of plaintiff's bill as prays a decree of foreclosure of said mortgage is denied.

It is further ordered, adjudged, and decreed that there is due to the plaintiffs on this day from the said defendants, C. E. Mitchell,
94 as administrator de bonis non of the estate of C. S. Barron, deceased, and W. H. Brazell, the sum of ten thousand seven hundred and ninety-three dollars and seventeen cents (10,793.17) on account of the balance of the debt due the plaintiffs from the late firm of Barron and Brazell at the date of the death of the said Barron and the

dissolution of said partnership. And it is ordered, adjudged, and decreed that said defendant, C. E. Mitchell, as administrator de bonis non of the estate of said C. S. Barren, deceased, do pay to the said plaintiffs the said sum of ten thousand seven hundred and ninety-three and seventeen cents, with interest thereon from this date at the rate of ten per cent. per annum from the moneys, real estate, goods, chattels, and effects of the estate of said Barron in his hands remaining to be administered and according to due course of administration, and that this judgment against said estate shall be classed and ranked as a debt duly authenticated and presented for allowance to the administrator of said estate as of the 22nd day of May, 1877.

And it is ordered and adjudged and decreed that said plaintiffs do have and recover of and from the said defendant, W. H. Brazell,
95 the said sum of ten thousand seven hundred and ninety-three dollars and seventeen cents, with interest thereon at the rate of ten per cent. per annum from this date, and that said plaintiffs have leave to sue out execution on this decree against said Brazell as upon a judgment at law. It is further ordered, adjudged, and decreed that plaintiff's bill be dismissed as to the defendants Margaret Barron, Maggie M. Barron, Lint L. Barron, Walter Barron, and Oscar Barron, and that the plaintiffs pay all taxable costs incurred by each of the said last-named defendants. And it is further ordered that W. P. Eakin, heretofore appointed receiver in this cause, turn over to the defendant Mitchell, the custody, control, and possession of the real estate in his hands as such receiver, and that he immediately pass his accounts as such receiver in the master's office. It is further ordered that said plaintiffs shall pay the fees and allowances that may be made to said receiver for his personal services as such receiver, and that they also pay all costs by them incurred in this case, and that the defendant, Mitchell, as administrator as aforesaid, pay all costs incurred by
96 him or the former administrator in this cause; and this cause is retained for further appropriate orders. The said plaintiffs, by their said solicitors, pray an appeal from this decree to the Supreme Court of the United States, which prayer for appeal is allowed, and said defendant, C. E. Mitchell, as administrator aforesaid, in like manner prays an appeal, which is also allowed.

The following depositions are on file in the case:

Deposition of John H. Dowell, taken February 15th, 1878.

My name is John H. Dowell. I reside in the city of St. Louis, Missouri. I am a cotton-factor and commission merchant, and plaintiff in this action. In the years 1875 and 1876, H. M. Mandeville was my partner, and the style of our firm was J. H. Dowell & Co. I was acquainted with C. S. Barron and W. H. Brazell, partners, doing business under the firm name of Barran & Brazell, in Hope, Arkansas, in the year 1875. Said firm commenced doing business with my firm November 18th, 1873, and continued their business connection with
97 us until October 4th, 1875, when Mr. Barren died, in Columbia County, Arkansas. At the time of Mr. Barren's death, said firm of Barren & Brazell owed my firm a balance of fifteen thousand nine hundred eighty-nine dollars and sixty-two cents ($15,989.62). This amount was due and owing on account of our having advanced them merchandise, and accepting and paying their drafts on us as their factors and commission merchants.

On the 9th of September, 1875, Barren & Brazell executed and delivered to J. H. Dowell & Co. their two promissory notes for five thousand dollars each, dated September 9th, 1875, and payable sixty and ninety days, respectively, after date, to the order of J. H. Dowell & Co. This did not cover their entire indebtedness to us. There was some three thousand dollars due from them to us over and above the amount of said notes.

After the death of Mr. Barran we received letters from Mr. Brazell, the surviving partner, regarding the continuation of the business of the firm of Barren and Brazell, as follows: One letter dated October 8, 1875, stating that the business would be continued under the
98 same firm name. This letter is hereto attached and marked Exhibit 1.

One letter, dated October 12, 1875, stating that Mrs. Barran accepted the administration and partnership, and that the business of the firm would be continued as before. This letter is hereto attached and marked Exhibit 2.

One letter, dated October 17, 1875, in which Brazell represented the necessity of further advances to meet the expenses attending the large cotton crop then coming in. This letter is hereto attached and marked Exhibit 3.

One letter, dated October 25, 1875, stating satisfaction with the weights and prices of accounts sales rendered. This letteris hereto attached and marked Exhibit 4.

One letter, dated November 24, 1875, notifying us of continued drafts on us. I may here add that we continued to accept and pay the drafts referred to in letters, for the express purpose of relieving the concern down there from the pressing demands of other creditors.

This letter is hereto attached and marked Exhibit 5.

99 One letter dated November 29, 1875, asking us to send them by express one thousand dollars per week, which we did. This letter is hereto attached and marked Exhibit 6.

One letter dated December 29, 1875, notifying us of another draft, which we paid. This letter is hereto attached and marked Exhibit 7.

I have been a retail country merchant in a cotton district, and I know that it is absolutely necessary for such a merchant, where he has money owing to him for goods sold to planters and others on credit, to have money on hand at all times to make advances to such debtors when they bring in their cotton for sale or shipment on account. That is to say, where a planter owes a merchant a balance on account, and has a lot of cotton to dispose of, valued at more than his debt to the merchant, he will turn over that cotton to the merchant, if the merchant will pay him in cash the excess of the value of the cotton over and above the amount of his debt. If the merchant is not in funds to do this, the planter will take his cotton to some other merchant who will
100 make an advance on it, and the first merchant will not collect his debt. Also, the merchant must have money to advance to the planters to help to pay the expenses of picking the cotton.

We made these cash advances, which are charged in the account exhibited with plaintiff's bill in this action, at the urgent solicitation and request of Barran & Brazell. All of our advances to them were made for the sole purpose of enabling them to make their collections, and to aid them out of their financial pressure. They were not made for any speculative purpose, or to make any money out of the new concern. Our object was to get even with the old concern.

We continued to make these advances, as shown in the account ex-

hibited with the bill, up to April 15, 1876, at which time the old firm of Barran & Brazell, composed of C. S. Barron and W. H. Brazell, were indebted to us, after applying all credits and offsets, a net of eight thousand four hundred forty-six dollars and eighty-three cents, $8,446.83;

and on the 25th day of April, 1876, W. H. Brazell, in his ca-
101 pacity of surviving partner, and in the name of the old firm of Barran & Brazell, executed and delivered to J. H. Dowell & Co. three certain promissory notes, for the sum of $2,815.61 each, payable respectively on October 15, November 15, and December 15, 1876, amounting in all to the $8,446.83, as above stated. These notes were payable to the order of J. H. Dowell & Co. They were not paid at maturity, and are still unpaid; and the sum of these notes, with interest, is still unpaid and due from W. H. Brazell and the estate of C. S. Barran, deceased, to J. H. Dowell & Co.

A large amount of the money advanced by us to Barran & Brazell, after the death of Barran, was used by Brazell, as surviving partner, to pay off the debts of the old firm, as is shown by letters hereto attached, as follows: 1 letter dated October 14, 1875, marked Exhibit 8; 1 letter dated November 6, 1875, marked Exhibit 9; and 1 letter dated October 27, 1875, marked Exhibit 10. There is another letter, written by Brazell, in name of Barran and Brazell, after Barran's death, asking

us to advance $5,000.00 to pay debts of the old firm. I have dili-
102 gently searched for this letter and am unable to find it. My impression is that it was handed to Mr. Lowry, our travelling agent, who is now in Arkansas, and that he now has it. We paid the $5,000.00 asked for in that letter, and about five thousand more, making in all about ten thousand dollars. This was paid in the shape of Barren & Brazell's drafts on us, and their acceptances payable at our office, in favor of different persons and firms. We paid the sums referred to, with the express understanding that the money was to used and was used in paying the debts of the old firm, contracted before Mr. Barran's death.

After Barran's death, Brazell never gave us any directions or instructions or request as to how a single dollar of the proceeds of sales of any shipments were to be applied.

Before the settlement and execution and delivery of the notes in April, 1876, as before stated, it came to our knowledge that Mrs. Barran was not a partner with Brazell, as Brazell had expressly stated to us in the letter marked Exhibit 2; and before closing the account we applied the proceeds arising from the sales of shipments to us, as follows:

103 1st. A sum sufficient to cancel and sittle the entire account made by Mrs. Barron and Brazell, as surviving partner; that is, subsequent to Barron's death, for I had no right to apply the proceeds of shipments in my hands otherwise than to the credit of the account of Brazell as surviving partner, or, as he represented to us, himself and Mrs. Barren in the new partnership, because these consignments were made by them and for their account.

2nd. The balance of $7,542.79 we applied as a credit on the account of the firm composed of C. S. Barran and W. H. Brazell, which application was approved by W. H. Brazell as surviving partner. This credit reduced the balance due on said account from $15,989.62 on October 4, 1875, to $8,446.83 on April 15, 1876; and for this balance of $8,446.83 the three notes referred to were given.

As security for the payment of these three notes, Brazell, as surviving partner, and in the name of the firm of Barran & Brazell, executed

relate to the business transactions, and adopt them as my own deposition, so far as that is possible.

I have no interest in the event of this action.

My statements regarding the surrender of the two five thousand dollar notes by Mr. Lowry, at Hope, Arkansas, when the last settlement was made, is made from my information and belief. I believe that these notes were handed to Mr. Lowry, and by him surrendered as stated. The notes are not now in our possession.

H. T. NORCOM.

Sworn to and subscribed before me this sixteenth day of February, 1878, at the place and within the hours in the annexed agreement specified.

[SEAL.] C. D. GREEN, JR.,
Commissioner for Arkansas, at St. Louis, Missouri.

111 *Exhibit 1 to deposition.*

HOPE STATION, ARK., *Oct.* 8, 1875.

Messrs. J. H. DOWELL & Co., *St. Louis, Mo.:*

GENTS: You have doubtless learned before this of the sudden death of our Mr. Barran, which sad event occurred on the 4th instant, at Magnolia, Ark. Our business will continue, as heretofore, under the management of our Mr. Brazell, and our bills and engagements promptly met and carried out.

Yours, truly,

BARRAN & BRAZELL,
Per ELLIS.

112 *Exhibit 2 to deposition.*

HOPE STATION, ARK., *Oct.* 12, 1875.

Messrs. J. H. DOWELL & Co., *St. Louis:*

GENTS: We hope you will not think we are drawing on you for more than we will be able to meet. Our customers are generally large planters, and are very busy picking their cotton while the weather is good. A great many of them have written us why they had not brought in cotton sooner.

We have received but little cotton from them as yet, but will within the next two weeks. Just indulge us a few more weeks, and we will make you easy. In regard to our business stopping, we could not think of such a thing. Mr. Barran owed nothing individually, and his wife accepts the administratorship and also the partnership, and the business will be run under the same style of firm as before, and under the supervision of the writer, W. H. Brazell.

Our goods are all in and fr'ts paid, so we are ready for business.

Our drafts will be higher from now on & shipments heavier.

113 We will send you b. l. to-morrow for 16 b. c. of good cotton, we think the best we have shipped. Useless for us to tell you to do best you can, for we are satisfied you will do that; but be sure to sell. We are unwilling to hold as long as we owe anybody. Hope to hear from you often.

We remain,

BARRAN & BRAZELL.

Exhibit 3 to deposition.

HOPE STATION, ARK., *Oct.* 17, 1875.

Messrs. J. H. DOWELL & Co., *St. Louis:*

GENTS: Yours of 15th to hand and contents noted. Am sorry you mis*ed*construed our motive in selling 21 b. c. cotton mentioned in our last letter. We did it because we knew it to be a hard bargain, and have now reinvested some of the money, and will continue to do so until you are paid. We have money enough on hand, perhaps, to run us, and you will get every b. c. until you are paid, and even afterwards; for we are satisfied no one can handle cotton better than yourselves.

Just indulge us a little longer, and we think we will prove what
114 we say. We have been forced to advance some money to our best customers, in order that they may gather their cotton. There is such an overwhelming crop made that they are not able to gather themselves.

We drew on you in favor Henry Ames & Co. unexpectedly. We paid them principally here, because we thought they were a little in-easy, and thought they may make some talk about it.

Maj. we certainly appreciate what you have done and are doing, and will certainly let you loose nothing by us. Enclose b. l. 21 b. c. cotton, and will ship all we can this week. Hope to hear from soon.

Respectfully, BARRAN & B.

Exhibit 4 to deposition.

HOPE STATION, ARK., *Oct.* 25, 1875.

Messrs. J. H. DOWELL & Co., *St. Louis, Mo.:*

GENTLEMEN: Find b. l. 13 b. c. for our account. We are pleased with sales sent out, both as to weights & prices.

Yours truly,

BARRAN & BRAZELL.
ELLIS.

115 *Exhibit 5 to deposition.*

HOPE STATION, ARK., *Nov.* 24, 1875.

Messrs. J. H. DOWELL & Co.:

GENTS.: We have taken the liberty to draw on you, at 30 days, in favor Crow, H. & Co., which we hope you will do us the favor to accept. We will ship you about 50 or 60 b. c. per week now until we have paid our account in full. This will give these parties ease. We hope, and we know, you will not loose anything by doing us this favor. Hoping this will meet your approval,

We remain respectfully your friends,

BARREN & BRAZELL.

Exhibit 6 to deposition.

HOPE STATION, ARK., *Nov.* 29, 1875.

Messrs. J. H. DOWELL & Co., *St. Louis:*

116 GENTS: Our meaning in telegram was $1,000.00, as we have never ordered more or less, but you need not send this week now as we have collected enough to run us this week. Hereafter, if you will express us $1,000.00 every week so as to reach us on Monday morning,

we will be much obliged. Let us know whether to rely on this agreement. This amount, with what we are collecting in money, will run us. We sent you b. l. eighty odd b. c. cotton from here and bal. from Emmet. We enclose b. l. 2 bales cotton from Emmet, marked as per b. l.

Respectfully,

B. & B.
BARREN & BRAZELL.

Exhibit 7 *to deposition.*

HOPE STATION, ARK., *December* 29, 1875,

Messrs. J. H. DOWELL & Co., *St. Louis:*

GENTS: We are shipping to-day 24 b. c., and have money enough here to do our business this week, and can ship you 50 or 60 b. c., with the collections we have made & will make this week. So we dr'ft on you in favor of F. Mitchell & Bro. for the other thousand that
117 you would send so as to reach us Tuesday. Please protect our draft, and much oblige.

Your friends,

BARREN & BRAZELL.

Exhibit 8 *to deposition.*

HOPE STATION, ARK., *Oct.* 14, 1875.

Messrs. J. H. DOWELL & Co., *St. Louis, Mo.:*

GENTLEMEN: We to-day draw on you, in favor of Messrs. Henry Ames & Co., for one thousand dollars, balance on carload bacon. We will ship you cotton at once to cover the same. We sold a car load of cotton here on yesterday, as we struck a good bargain, and will reinvest the proceeds in cotton to be shipped to you as fast as possible. Cotton is coming in very fast, and sales of goods very heavy.

Your friends,

BARRAN & BRAZELL,
By ELLIS.

Exhibit 9 *to deposition.*

HOPE STATION, ARK., *Nov.* 6, 1875.

118 Messrs. J. H. DOWELL & Co, *St. Louis, Mo.:*

GENTLEMEN: We hand you b. l. 24, b. c. and b. l. 26 on yesterday. We want you to send us one thousand dollars as soon as possible. Please pay our acceptance for N. C. Harris & Co. when presented.

Our cotton is coming in very fast, and all our customers show a decided disposition to pay us promptly as possible.

Yours, truly,

BARRAN & BRAZELL.
ELLIS.

Exhibit 10 *to deposition.*

HOPE STATION, ARK., *Oct.* 27, 1875.

Messrs. J. H. DOWELL & Co., *St. Louis, Mo.:*

GENTLEMEN: Send us by express one thousand ($1,000) dollars: Send Send $200 in small change if possible.

Cotton is coming in very fast. We think we get about a car-load to ship to-day.

We shipped two (2) b. c. from Emmett on yesterday, and have not yet rec'd b. l.

Yours, truly,

BARRAN & BRAZELL.
ELLIS.

119 The following depositions are on file in the case:

Deposition of Martin Hartin, taken October 17, 1878.

I was present when a contract was made and entered into between Barran & Brazell and Seawal & Hartin for the building of a two-story brick house on lots one (1) and two (2), in block twenty-seven (27), in the town of Hope, Hempstead County, Arkansas. I was one of the contracting parties in that transaction, being the Hartin of Seawell & Hartin, and aided in the building of said house.

Question (by defendants). State what was said by C. S. Barran, the deceased, at the time the contract was entered into.

Answer. When the contract was read over and Mr. Barran discovered that it was drawn in the firm-name of Barran & Brazell, he said to Dr. Archer, who had drawn the contract, that that part was wrong; that he was doing that building himself; and that he had a deed to the lots upon which the house was to be built, and when Dr. Archer replied that he did not know that, Mr. Barran said, "Well, let it go along; we can fix that any time."

120 (To which question and answer the plaintiffs, by their attorneys, except.)

Question (by defendants). Did he say anything further at that time upon that subject?

Answer. He said further that, although it was generally understood that he and Brazell were partners in business, yet Brazell's interest was comparatively small, and he wanted it distinctly understood that he was building that house himself.

(To which question and answer the plaintiffs, by their attorney, except.)

When I was about the building during its progress Mr. Barran generally gave directions about the work, but I was not about the building a great portion of the time, Mr. Seawell having direct charge of the work and I being employed at the brick-yard. The paper here presented and marked Exhibit A, No. 1, to this deposition, is a duplicate of the original contract entered into for the building of said house, and the signatures thereto are all genuine. I signed it and Mr. Seawell and Mr. Barran signed it in my presence. I never knew any other person than Mr. Barran to give any directions about the building. Barran & Brazell furnished us a large portion of the material, and we got most of our pay from the store on orders.

MARTIN HARTIN.

121 *Deposition of R. B. Archer, taken October* 17, 1878.

The papers here presented to me, marked Exhibit A, No. 1, to the depositions of Martin Hartin, was written by me, except the interlineations. When it was prepared and presented to the parties, I remember that Hartin and Seawell said it was all right. Mr. Barran being re-

ferred to, said it was all right, with the exception of the Brazell part; that Brazell had nothing to do with it. I suggested that the contract be re-written. Mr. Barran said, "No;" that they contemplated some changes in the plan of the building; that they were thinking something about an iron front, and when those changes were agreed upon the contract could be fixed; but that he wanted it distinctly understood that that building was his, and that Brazell had nothing to do with it. These declarations were made by Mr. Barran immediately before he signed the contract. I saw Seawell, Hartin, and Barran sign the contract.

(Here the plaintiffs, by their attorneys, except to so much of the foregoing deposition as embody any statement purporting to have been made by C. S. Barron.)

122 R. B. ARCHER.

Deposition of Jessie L. Ellis, taken October 18. 1878.

I was the bookkeeper for the firm of Barran & Brazell, in the town of Hope, from about the first of July, 1875, until the death of Barran, about the fourth of October, 1875, and for the surviving partner, Brazell, until the business was taken out of his hands and placed in the hands of a receiver, at the suit of Ben. F. Askew, as administrator of the estate of said Barran. My name is J. L. Ellis. Dr. R. B. Archer was my predecessor in the position of bookkeper for said firm. Dr. Archer was not a lawyer. On the fourth of October, 1875, the books of Barron & Brazell showed an indebtedness to J. H. Dowell & Co. of about three thousand dollars; but I think that said J. H. Dowell & Co. had accepted for Barran & Brazell for other amounts which were not entered on the books at that time. Said acceptances were afterwards entered on said books, prior to the 28th day of October, 1875, and on said 28th day of October, after said acceptances had been entered
123 on the books, they showed an indebtedness to said J. H. Dowell & Co. of about eleven thousand dollars. The schedule of liabilities, here shown to me, and a letter signed Barran & Brazell, addressed to Col. B. F. Askew, Magnolia, Ark., dated October 28th, 1875, are both in my handwriting. They were prepared by me at the request of B. F. Askew, as administrator of the estate of C. S. Barran, deceased. The schedule is marked Exhibit A, No. 2, and the letter Exhibit A, No. 3, and both hereto attached. Said schedule contains a correct statement of the indebtedness of said Barran & Brazell to J. H. Dowell & Co. at that time, and also of the other indebtedness of Barran & Brazell, as shown by their books. The paper here shown me is a statement of the assets and liabilities of the firm of Barran & Brazell on said 28th day of October, 1875, likewise prepared by me, at the request of said Askew. It is marked Exhibit A, No. 4, and is hereto attached. That statement contains a correct approximate estimate of the assets of said firm, and contains nothing except what was on hand at the time of Barran's death.

The stock was estimated at its original cost with transportation
124 added. In estimating and adding transportation we added ten per cent. to the original cost. The most of this stock was disposed of Brazell before the appointment of the receiver before referred to. Some remnants, I think not a great deal of this old stock, was turned over to said receiver. The goods were sold at an average advance on cost and transportation of above, twenty-five or thirty per cent. The paper here shown me, dated June 1st, 1876, is in my handwriting like.

wise furnished at the request of said Askew, and is a correct statement from the books at that time. It is marked Exhibit A, No. 5, and is hereto attached. From said statement as compared with the one of October 28th, 1875, it appears that there had been collected of the notes and book accounts by Brazell, after the death of Barran, the sum of twelve thousand eight hundred and eight'-eight dollars and ninety-eight cents ($12,888.98.)

In the item of real estate, in the statement of October 28th, 1875, that estimate was given me by Mr. Brazell, and I do not know what real estate was included therein. At the time of Mr. Barran's death the firm was doing business in a wooden building on east First street, and
125 not on lots one and two, in block twenty-seven. It was my understanding, and generally so understood, that said wooden building and the lot on which the same was situated, was the property of the firm of Barran & Brazell. Mr. Brazell moved into the brick store on lots one and two, in block 27 after the death of Barran.

Mr. Barran gave most of his personal supervision to the erection of the brick house, and was most of the time out of the store for that purpose. I do not know who was building the house, but I know that the contractors were paid out of the funds and goods of the firm. The contractors were settled with on the evening of the 5th of November, 1875, and Brazell commenced moving into the brick store on the following morning. On that settlement with the contractors there was a balance of about one hundred and ninety-two dollars due them, for which a due-bill was given them. During the time that Mr. Brazell was carrying on the business, after the death of Mr. Barran, he bought cotton and paid money for it, from parties who were not indebted to Barran & Brazell. I know this fact because I was bookkeeper, and as such settled
126 all the cotton business and paid out the money. During this same time, after examining the shipping book, I think about two hundred and fifteen or twenty bales or more were bought for cash from parties who were not at the time indebted to Barran & Brazell. During the same time Mr. Brazell shipped to J. H. Dowell & Co. in all, over six hundred bales of cotton. He also shipped to Kirtland, Humphreys & Mitchell and others, a considerable quantity of cotton. Among the cotton shipped to other parties besides J. H. Dowell & Co. was some cotton that he had bought for all cash, not being from persons who were indebted to the firm of Barran & Brazell. J. H. Dowell & Co. did ship money by express to Brazell, with which to buy cotton during the time aforesaid. From my knowledge of the books and business of Barran & Brazell, I would say that at the time of Mr. Barran's death the assets of the firm of Barran & Brazell were sufficient to have paid off its liabilities, if the same had been well and properly managed without the necessity of purchasing more goods, or continuing further in
127 business. I have been a book-keeper and a man of business in my general employment for about twelve years. The goods on hand were fresh and salable, and the debts due were mostly solvent. The agent of J. H. Dowell & Co., one Mr. Camron was here during the time aforesaid, and solicited Mr. Brazell to continue business, proposing to furnish money to buy cotton. He made his headquarters at the store of Barran & Brazell when he was here, which was frequent, and the money from J. H. Dowell & Co. was frequently received from Camron in person.

Question (by defendants). "How shortly after the death of Mr. Barran, did Cannon make any solicitations to Brazell, and propositions to furnish money?"

Answer. I think it was about two weeks after the death of Barran, that Cannon came down, and had a conference with Brazell, using the solicitations and making the propositions aforesaid. I know that Cannon was here about the time mentioned, but as to his solicitations and propositions to Mr. Brazell, my information is derived from him, not having heard them myself. I however received and receipted
128 for the money myself. (To which question and answer the plaintiffs' by their attorney except.) The warehouse attached to the brick store-house, is upon lot 3, in block 27, in said town of Hope. Upon examination of the books of the firm, I find that Mr. Barran's total credits are $19,682.42, and his debits are $11,127.35—the balance on the ledger showing the above statement are in my handwriting; and that Mr. Brazell's credits up to the 22nd day of June, 1876, amount to $941.61, and his debits $4,340.64. On the 4th of October, 1875, his credits were, $342.66; his debits $2,603.52. After the death of Mr. Barran, Brazell just continued the business, using the assets of the firm, purchasing and selling goods, and buying and shipping cotton, and collecting and paying debts as before. He kept the accounts and transacted the business in the name of the firm and as though there had been no change in the business or dissolution of partnership by death. Mr. Cannon, the agent of the plaintiffs must have known that the business was continued as above, because the shipments of cotton were in the firm name, as was also the receipts given for money,
129 and Mr. Cannon was frequently in the counting-room, and had access to the cotton-books. At the time Mr. Brazell was removed from the management of the business, there had been a considerable loss of the assets of the firm, as compared with the assets at the time of Barran's death.

Question (by defendants). "Were you ever instructed, as bookkeeper, to charge Mr. Brazell with the half or any part of the purchase money for lots one and two, in block 27, on which the brick store-house is built?"

Answer. "No."

Question (by defendants). "Did you ever hear either Barran or Brazell say anything about Brazell having purchased an interest in said lots?"

Answer. "No."

(To the last two questions and answers the plaintiffs by their attorneys except.)

The cost of the brick store-house on lots one and two, in block twenty-seven, in the town of Hope, Hempstead County, Ark., was $6,802.50 complete. This amount is credited to Hartin & Seawell the contractors, on the books of Barran & Brazell.

Question (by defendants): Do you remember whether or not
130 there was any cotton shipped by Brazell after the death of Barran to J. H. Dowell & Co., with special instructions for immediate sale, and if yea, what J. H. Dowell & Co. did in the premises?

Answer. On or about the 18th day of November, 1875, by direction of Mr. Brazell, I wrote to J. H. Dowell & Co. in the name of Barran & Brazell to sell all cotton received in the future on arrival, unless otherwise directed, and so far as I know, no other directions or instructions were ever given, and I wrote all the business letters of the house, and attended to all their correspondence—I mean all their business correspondence—so far as I had any knowledge of the same. The said J. H. Dowell & Co., instead of selling all cotton shipped to them, on arrival, held some of it for two or three months. During said time or about the

18th or 20th of January, 1876, cotton began to decline, and at about the 1st to the 5th of February, 1876, it had declined 2¼ or 2½ cents in the pound. Even in June, 1876, when the books were turned over
131 to the receiver, not all the accounts of sales had been received and therefore, I cannot tell the amount of the loss sustained as above. I think there were about 300 bales of cotton on hand at the 1st of February, 1876. There must have been about 300 bales in the hands of J. H. Dowell & Co., when the decline in price referred to began. In my opinion, said opinion being based upon my recollections of the weights of the cotton as I settled for it, the said 300 bales of cotton would have averaged above 465 pounds to the bale.

JESSIE L. ELLIS.

Deposition of George M. Ellis taken October 18, 1878.

I was employed by the firm of Barran & Brazell as a clerk, on the 28th day of October, 1873, and continued in the employment of the firm until about the 18th day of April, 1876. They commenced business in a wooden store-house on East First street in the town of Hope, where they continued to carry on business until after the death of Barran. I was in the employ of said firm during the time that the brick
132 store-house on lots one and two, in block 27, in said town of Hope, was being constructed. I had a general knowledge of the business of the firm, derived from my own participation in its transactions, from looking at the books, and from what Mr. Barran told me in regard to it.

Question (by defendants). "Was there any instructions or directions given you as to how the accounts between the contractors for building said store-house, and the firm of Barran & Brazell should be kept, and what final disposition, if any, was to be made of them?"

Answer. The first bill that was purchased by the contractors was entered on the blotter, and charged to C. S. Barran amounting to something less than a hundred dollars. I then suggested that as Martin Hartin, J. P. Seawell, and Seawell & Hartin had or would have accounts there, that it would be best to charge all bills on account of the brick building to Martin Hartin, J. P. Seawell, and to Seawell & Hartin as the case might be, until said building was completed, and then that the whole amount of said accounts paid out of the store, or by the firm of Barran & Brazell, on account of said building should be
133 charged to C. S. Barron on the books of said firm. Mr. Barron agreed to my suggestion, and directed me to make the charges accordingly. I do not know whether Mr. Brazell was informed of these instructions by Mr. Barran or not. He was not present at the conversation referred to.

(To the last question and answer the plaintiffs, by their attorneys excepted.)

Question (by defendants). Were you present at any time, when there was a contract made or conversation had in regard to an iron front, between one Mr. Howard, the representative of an iron house, St. Louis, and Mr. Barran, and if so, what was said?

Answer. Mr. Barron agreed to take the iron front, and Mr. Howard suggested that he should have the firm name of Barran & Brazell cast upon the front, to which Mr. Barron objected, and stated that if any name was to be placed upon the house it should be "C. S. Barron." Mr. Barron afterwards stated to me that his reason for this was, that as soon as the house was completed the business would be changed.

(To the last question and answer the plaintiffs, by their attorneys, except.)

134 The brick building on lots one and two, in block 27, was not completed at the time of Mr. Barran's death. The firm of Barran & Brazell, nor W. H. Brazell, ever had possession or control of lots one and two, or the house erected thereon, until after the death of Mr. Barran. Mr. Barran claimed the property, and gave all instructions in reference to building the house. He had possession of the property—had a tenant on a portion of it, from whom he collected rent individually, and Mr. Brazell had nothing to do with it. He removed a frame building from where the brick house now is to an opposite corner of the property, and Mr. Brazell was not consulted about the removal of the said frame house, or about the rents thereof, as it was an outside matter altogether.

The accounts of Martin Hartin, J. P. Seawell, and of Seawell & Hartin, had not been closed on the books and charged or carried to the account of C. S. Barran, up to the time of his death. I do not know what disposition was finally made of said accounts. They were still

135 open upon the books of the firm of Barran & Brazell on the evening before Brazell took possession of the building and commenced moving into it.

G. M. ELILS.

J. L. ELLIS recalled, says:

The entry of the cost of the brick building, which was $6,802.50, was made on the 9th of November, 1875, and after the death of Barran, and was charged to real estate account in an entry of "Sundries to Hartin & Seawell." This is the entry of the same amount mentioned in my former deposition herein. Said entry was made by me at the instance and by the instruction of Mr. Brazell, who was at the desk when the settlement was made with Hartin & Seawell.

JESSE L. ELLIS.

Deposition of Jacob B. Powell, taken October 18, 1878.

136 I am acquainted with the brick store and warehouse in controversy in this suit. The firm of McNeill, Powell & Co., is now in possession of said property, of which firm I am a member. The said property has been in possession of the firm of McNeill & Powell and of McNeill, Powell & Co., for a little more than two years. For the rent of said property for the past two years we have been paying one thousand and twenty-five dollars, until the present year. For the present year we are paying eight hundred and fifty dollars. I would say that the rent of the warehouse, and the wagon-yard connected therewith, is worth at least one-fourth of the whole amount, ordinarily, and this year that it is worth one-third of the actual value of the whole, and that this is owing to the fact that store rents have fallen, and warehouse business has increased at this place.

J. B. POWELL.

Deposition of Mahala J. Aubry, taken October 19, 1878.

137 During the lifetime of C. S. Barron, and up to the time of his death, I was his wife. There was never any conference between myself, Mr. B. F. Askew, and Mr. W. H. Brazell in regard to continuing the business of Barran & Brazell, and in fact we three were never together at any one time in our lives. Mr. Barran never at any

time informed me, or intimated to me that Mr. Brazell had, or was to have at any time any interest in the brick house erected on lots one and two, in block 27, in the town of Hope. Mr. Barran was not in the habit of talking to me a great deal about his business, but he told me that that brick house and lot was for his wife and children. With regard to the mercantile business of Barran & Brazell, I never assumed to have or exercise any control over or management of it; and never made or entered into any agrement with any person in regard thereto.

(To all the statements of the last witnesses, the plaintiffs, by their attorneys, except.)

M. J. AUBREY.

Deposition of Benjamin F. Askew, taken October 19, 1878.

138 I am the Benjamin F. Askew, who was one of the defendants in this suit. Since its institution I have resigned the administration of the estate of C. S. Barron, deceased, and C. E. Mitchell has been appointed in my stead. There was never any conference or agreement between myself, as administrator of the said estate, Mrs. Barran, and Mr. W. H. Brazell, in regard to continuing the business of Barran & Brazell. I remember to have met a Mr. Cannon, the agent of the plaintiffs, twice. The first time being in the winter of the year 1875, after the death of Barran, and before the first of January, 1876. I then had a conversation with him on the subject of the business of Barran & Brazell, in which I stated to him, plainly and distinctly, that Barran's estate would not be in anywise responsible for any future contracts or liabilities of said firm of Barran & Brazell. A tthe time of Barran's death, the firm was doing business in the wooden building on East First street, where the stock remained for some time afterwards.

139 In a conversation between Brazell and myself, I made no objection to the removal of the stock into the brick house, because there was less danger from fire in that than in the frame building; but it was my intention to charge the firm of Barran & Brazell with the rents of the property. Some time after the stock had been so removed, Mr. Brazell stated to me that Mr. Barran had agreed to make him a deed to a half interest in that part of lots one and two upon which the brick house was situated. There was a frame building on the same lots, which Mr. Brazell said he desired to use as a warehouse, to which I consented upon his agreeing that the firm would pay rent for it. He occupied it for only a short time, when he concluded to build a warehouse. I then, as the administrator of Barran's estate, rented said frame building to other parties, and collected rents therefor, to which Mr. Brazell never interposed any objection, nor did he ever receive or claim any portion of said rents. My information is, that the warehouse which Mr. Brazell proposed to build, and which was afterwards built, is upon lot three (3) in said block 27. When I came into the possession

140 of the papers of Barran, I found among them a title bond or contract of sale, from Patrick Donnelly to C. S. Barron for said lot three (3), from which I learned that there was a balance due upon the same. Sometime in the month of January, 1876, I met said Donnelly, and he agreed to take the sum of two hundred dollars in full payment of the balance due on said lot, which sum I paid him, and took from him and his wife, a deed to me, as administrator of said Barron's estate. On the 4th day of November, 1875, after having received the

statement of October 28, 1875, exhibited with the deposition of J. L. Ellis, I wrote to J. H. Dowell & Co., of St. Louis, Mo., as well as other creditors, informing them that I had been appointed administrator of the estate of C. S. Barron, and inquiring whether Mr. Brazell was paying off the liabilities of the firm of Barran and Brazell, as was his duty to do. In response to which letter, I received a letter dated November, 9th, 1875, from said firm, which is hereto attached, and marked "Exhibit A, No. 6."

(To all the statements of the last witness, the plaintiffs, by their attorneys, except.)

B. F. ASKEW.

141 *Deposition of Wm. H. Brazell, taken October* 21, 1878.

My name is William H. Brazell; my age is thirty-three years; my present occupation is that of a clerk. I was in partnership with C. S. Barron, under the firm name of Barran & Brazell, which partnership was formed and entered into in the fall of the year 1873, I think, during the month of October. J. H. Dowell & Co. were the factors and commission merchants of the firm of Barran & Brazell. The indebtedness of the firm of Barran & Brazell on the 4th day of October, 1875, to said J. H. Dowell & Co., amounted to something over fifteen thousand dollars. On the death of Mr. Barran I was left in charge of the business of the firm. There was at that time a considerable amount of outstanding indebtedness due the firm. I do not know how much. After Barron's death there was an understanding between myself, Mr. Barron's widow, and Mr. Askew, the administrator of Mr. Barran's estate, to the effect that I should continue the business as it had been carried
142 on, at least through the season, in order to wind up the business. Of that understanding I informed J. H. Dowell & Co., the plaintiffs in this suit. At that time I considered the assets of the firm of Barran & Brazell amply sufficient to pay all their liabilities, and I so informed said J. H. Dowell & Co. I also informed them of the reason why the business was to be continued as before. It was necessary to enable me to close up the business of the firm that I should have advances. They were obtained chiefly from J. H. Dowell & Co. On the 4th day of October, 1875, the indebtedness of Barran & Brazell was twenty-five thousand dollars or upwards. At the close of the business season, say April, 1876, it was about ten thousand dollars. The greater portion of this last-mentioned sum, say all but about one thousand dollars, was due to the plaintiffs. Considerable sums of money were advanced by plaintiffs to the firm of Barran & Brazell during the months of October and November, 1875, which I presumed to have been advanced on the faith of Barran's estate, inasmuch as they had
143 been notified that the business would be continued as before, and under the same firm name. When I wanted money in the business I drew for it, just as had been done before Barron's death, and always got it. On the 15th of April, 1876, when Barran & Brazell, through me, had a settlement with the plaintiffs, the amount then due them was eight thousand four hundred and forty-six dollars and eighty-three cents ($8,446.83). That account was closed by the execution of three promissory notes, secured by a mortgage. In shipping cotton to plaintiffs, after Barran's death, I never directed what accounts should be credited with the proceeds. The business after Barron's death was carried on with the knowledge and approval of B. F. Askew, the administrator of Barran's estate. The advances made by plaintiffs served to

swell the fund out of which the debts of Barran & Brazell could be and were paid. Shortly after the death of Barran the business was removed into a two-story brick house on lots one and two, in block twenty-seven, in the town of Hope, which house was built and paid for with the
144 funds of the firm of Barran & Brazell. The house was built for the purpose of being used by the firm as a store-house, although the title to the lots was in Mr. Barran. I think the house cost something over seven thousand dollars, as well as I now remember. I refer now to the brick store-house only. The warehouse was built afterwards by me, and was paid for with the funds of the firm. It was agreed by Mr. Barran that when the house was completed he would deed to the firm that portion of the lots to be covered by our improvements and needed for our business at the same price that it cost him, which, I think, was three hundred and fifty dollars, and which sum was to be charged to the firm of Barran & Brazell. The mortgage given to secure the payment of the three notes heretofore mentioned was intended to in*duce* both the store-house and the warehouse, and if the lots or any one of them is therein improperly described, it was a mistake on the part of draughtsman and not intentional.

Cross-examined by defendants:

145 The articles of partnership between Mr. Barran and myself were reduced to writing, the original of which is hereto attached and marked Exhibit A No. 7, to this deposition. Lots one and two, in block twenty-seven, were originally purchased for Mr. Barran and were not partnership property. I think lot three was purchased sometime after the other two by Mr. Barron himself, but know nothing of the particulars of the purchase or payment. The understanding with Mr. Barron was that he should deed to the firm such portion of the property as would be needed by the firm for the transaction of its business; but at the time of that agreement we had no other building in contemplation, except the brick store-house. That portion of lots one and two on which a frame building stands, now used as a saloon, was not intended to be included in the deed from Barran to the firm. The firm of Barran & Brazell never were in actual possession of that portion of the lots which were to be deeded by Mr. Barron to the firm, prior to the death of Barran, though the brick building thereon was in
146 course of construction under contract with the firm, and was being paid for out of the firm assets as the work progressed. The money advanced by J. H. Dowell & Co. to me in the management of this business was sometimes received direct from the agent of that firm one Mr. Cannon, and at other times was paid upon drafts. In the use of that money I sometimes bought cotton from persons who were not indebted to the firm of Barron & Brazell, but most generally in the payment of balances on cotton to persons who were so indebted. I think, after Mr. Barran's death, I shipped about a thousand bales of cotton to the plaintiffs, and instructed them in several letters, to sell the cotton on arrival.

This arrangement was in fact made with the plaintiffs, when I was in St. Louis, at the beginning of the season, and before Mr. Barran's death, as we had felt the sting of holding cotton the season before. This arrangement was not carried out and the instructions afterwards given them by letter were disregarded by plaintiffs. My recol-
147 lection is that accounts of sales had not been received from plaintiffs prior to the first of March, 1876, for more than about one hundred bales, the bulk of it being sold in March and April, 1876.

I think the loss to the firm of Barran & Brazell, on account of the disregard of the arrangement before referred to, and the instructions given plaintiffs would amount to about eight dollars per bale.

(To so much of the statement above as relates to the sale of cotton and the disregard of instructions by plaintiffs, the plaintiffs, by their attorneys, except.)

All the assets of the firm of Barron & Brazell which came into my hands after the death of Barran, was applied to the liquidation of the debts and liabilities of the firm, without regard to whether they were created before or after his death, up to the time that the business was turned over to a receiver, and excepting what went into his hands. There never was any conversation or consultation between myself, Mrs. Barran and Mr. Askew, as the administrator of the estate of Barran, on the subject of continuing the business of the firm, when
148 we were all three together. Mr. Askew lived about forty miles from Hope, and my recollection is that he was only here two or three times during the time that I was managing the business of the firm, after Barran's death. Although Mr. Askew had access to the books of the firm I do not know that he ever examined them particularly, nor do I know that I ever had any particular conversation or agreement with him in regard to buying cotton or goods; neither do I know that he had any knowledge of the fact that I was buying goods and cotton.

Soon after the death of Barron I talked with Mr. Askew and with Mrs. Barron on the subject of continuing the business, and although there was no definite agreement with regard to the terms, the understanding was that I should continue the business at least through the season, with a view to winding it up.

I am informed that the frame house on a portion of lots one and two has been rented for three hundred dollars per annum. The
149 three notes heretofore mentioned which were executed by me in the name of Barran & Brazell, to J. H. Dowell & Co., were intended to include all indebtedness of Barron & Brazell, whether such indebtedness existed at the time of Barran's death or was created afterwards.

W. H. BRAZELL.

Exhibit A No. 1 to deposition of Martin Hartin.

This article of contract and agreement by and between Martin Hartin and P. J. Sewell, as party of the first part, and C. S. Barran and W. H. Brazell, as party of the second part, witnesseth that the said Hartin and Seawell, of the first part, contract and agree to contract and build for the party of the second part, in the town of Hope, county of Hempstead & State of Arkansas, a brick house thirty feet
150 wide by one hundred feet in length, foundation to commence with two and half bricks up to bottom floor joists; thence to top of joists with two bricks; thence to the bottom of upper joists (thirteen feet) to be thirteen inch wall; fire-walls from upper joists four feet, or sufficient for protection to roof, the covering to be of sheet-iron patent roofing.

Three doors in front end and two windows, and one door in the sides or rear, and as may hereafter be determined upon. The lower joists or sleepers to be two by fourteen inches; upper joists, two by eight inches; rafters, two by six inches, to be close-sheeted, one inch thick. All to be plastered inside in good style of hard-finish work; all ma-

terial to be furnished by contractors, and to be of good and substantial quality; and the machinism to be done in good, substantial, and workmanlike manner, with one chimney, size and location to be determined upon. The exterior of the whole building to be painted and walls pencilled in appropriate manner. The house, as specified, to be completed and ready for delivery by the first day of September next.

151 In consideration of the obligations and stipulations entered into by the party of the first part, the party of second part agree and obligate themselves to pay to the party of the first part the sum of three thousand dollars, in partial payments, to be made as may be necessary to procure necessary material and incidental expenditures as the work progresses; and all payments to be made by the first day of January, 1876.

In evidence whereof the contracting parties hereunto subscribe their names this 19th day of June, A. D. 1875, to two copies of this agreement.

MARTIN HINTON, J. P. SEAWELL, } 1st party.
BARRAN & BRAZELL, P'r C. S. BARRAN, } 2nd party.

Exhibit A No. 2 to deposition of J. L. Ellis.

Liabilities of Barran & Brazell, Oct. 28, '75.

Appliton, Noyes & Co		377 60
Bohnn & Co		338 93
	Bloomingdale, Rhein & Co	1,006 75
152	Block & Brittian	382 50
	Sam'l Cupples & Co	277 15
Crow, Hargadine & Co		3,345 05
J. H. Dowell & Co		11,000 00
Damon & Co		591 07
R. & T. A. Ennis		21 16
Fines Bro's		75 09
Hamilton & Brown		578 55
	do	95 00
N. C. Harris & Co		406 13
Home Bitters Co		66 21
Horten & Co		344 90
B. A. Hickman		150 10
Kirtland, H. & M		1,012 24
Kembrough & Co		170 00
Leggett & Myers		397 52
Leslie, Garnett & Co		41 00
F. Mitchell & Bro		972 86
Mo. Glass Co		105 75
McLaran, Williams & Co		6 60
T. R. Pullis		384 67
Probst & Hilt		317 83
Coope & Gumis		175 00
A. F. Shapleigh & Co		449 86
Semple, Birge & Co		155 00
Utterback & Co		246 20
J. H. Wear & Co		1,335 83
E. Martin & Co		100 25
Henry Ames & Co		1,560 00
Total		$26,426 80

153 *Exhibit A No. 3 to deposition of J. L. Ellis.*

HOPE STATION, ARK., *Oct.* 28, 1875.

Col. B. F. ASKEW, *Magnolia, Ark.*

DEAR SIR: We send you statement desired, as near correct as possible for us to answer at, and hope they will prove all you may wish in making up your inventory; however, if you desire other information, write us at any time and we will use all efforts to do your commands.

Your friends,

BARRAN & BRAZELL.
ELLIS.

Exhibit A No. 4 to the deposition of J. L. Ellis.

Statement of assets and liabilities of the firm of Barran & Brazell, Hope, Ark., Oct. 28, '75.

ASSETS.

Real estate, approximated valuation		8,000 00
Book accounts " amount due		20,000 00
Amount stock genera' merchandise		48,000 00
		$46,000 00

154 LIABILITIES.

Amount due in open acc'ts and notes outstanding unpaid, as per correct list attached hereto	26,426 80

Exhibit A No. 5 to deposition of J. L. Ellis.

Statement assets and liabilities of Barran & Brazell.

Total amount of liabilities		11,720 03
Total am't of open acc'ts	5,919 96	
" " " notes	1,191 06	
" " " " stock	3,413 60	10,523 62
St		$1,196 41

HOPE, *Jan.* 1*st*, 1876.

Exhibit A No. 6 to deposition of B. F. Askew.

ST. LOUIS, *Nov.* 9, 1875.

155 B. F. ASKEW, Esq., *Magnolia, Ark.*

DEAR SIR: Your valued favor of 4 inst. rec'd. In reply state the firm of Barran & Brazell have been shipping to us and drawing as usual; they, we learn, are dividing their business. We are not getting all of it, although we feel we are justly entitled to it. We advanced the firm largely during the summer. We believe we are the only house in St. Louis who would have advanced them as much cash as ourselves & we did it for the sole purpose of control'ing their entire shipments of cotton. We have never refused them a dollar, paid every draft, filled every order, sent every dollar in currency ever asked for, sold their

cotton for good prices which they say to us all very satisfactory. Still they fly us & we loose the commission on the cotton we had fully expected to get. We gave the concern a very fine credit here, our advancing so liberal put them on good footing as men could be who bought goods on time; the manner in which we always treated their business, the promptness we always used in making their pay-
156 ments. We took up often large notes falling due in bank out of season for receiving cotton, waited on them till they could ship, & by our paying these notes due in summer & keeping them supplied without stint all summer in bacon, corn, flour, meal, all cash items here, for their building in fact they had a cart' blanche at our money with simply 10 % per annum interest, no charge for advancing above this. We bought these goods for nett cash; give them the benefit. We know they had goods as low as they went out of St. Louis this season in any quantity ordered and not a day delay. Now we call this a "mighty big thing" for a country merchant to have. We know of no house here able or willing to give as liberal by them as we have. We have advanced them $15,000.00 in that neighborhood, cash, without security; now they ship a house part of their business who would not begin to touch that am't. We don't think they could if they would, because a house cannot very well afford to do business with only one firm, & we feel very sure if they took many like it they would hardly make it. We think they are a making a mistake to go in a divide of their business without a cause; they took money from a party and agreed
157 to ship their cotton, now all on earth they had to do was to use the telegraph to get money from us in one day's time, & if they felt like we do, they would not accept 500$ as a gift & divide their business; they of course feel different. We have not the least fears but that they will pay us, but pay is not all to be considered; a firm rarely advances so much just to get their money back. We had a matter of pride handling their all. We done what we did to do it. We of course, as other merchants, have a feeling to handle largely of cotton, like a big customer, & we did not stop to question how much it took to handle the business. We felt ourselves able to handle it and did it freely, & we think we did it in good style without a fault; in our feeling someway we are disposed to think Mr. Ellis is possibly influencing Mr. Brazell. We can't say he is, but something is over which we cannot find out. We feel sure we have done our duty, & if you can cause us under all the to control all the business, we would be glad you would. Now we do not know how many bales has been shipped from our house—the principle is the same even small. I have been a
158 country merchant & have had money offered me when needing it badly, but I would not go back one my merchant; it is their own fault if they get without money, because they had nothing to do but write or ask, & they knew it, & for this reason it hurts, besides the time is so short, 24 hours, any time places them in funds.

If you can, as Mr. Barran's friend and adviser, say anything we believe it will be of interest to the firm. The' owe for fall stock & will be needing considerable, and when we know we will get the cotton we *are* want to be liberal; but if we are to be in doubt all the time, who will get the shipment? We cannot have the confidence requisite to all business success; at the same time we feel the subject a delicate one, & desire to so handle it because it is a matter of very vital importance to both us & them. We are quite anxious to do the business.

Very truly,

J. H. DOWELL & CO.

P. S. We have been their friends perhaps in a much greater extent
159 than a young man might consider; business experience of years would teach them. Very few men have enjoyed their opportunities through us. We have often been questioned, & we expect when a firm like ours takes hold of men as free as we did them, it is a big card for them, as it gives them a big credit; because when they owed a man they drawed at sight on J. H. Dowell & Co. & it was paid, & J. H. Dowell & Co. carried it till B. & B. could ship cotton. This then, we repeat, give them a fearful good credit.

J. H. DOWELL & CO.

160 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the original remaining of record in my office.

In witness whereof I have hereunto set my hand and the seal of said court, this 17th day of June, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the one hundred and third.

Attest:

[SEAL.] RALPH L. GOODRICH,
Clerk.

(Indorsement on cover:) No. 221. C. E. Mitchell, adm'r de bonis non of C. S. Barron, dec'd, appellant, vs. John H. Dowell and H. M. Mandeville, late partners as J. H. Dowell & Co. Filed 31st July, 1879. And No. 467. J. H. Dowell and H. M. Mandeville, late partners as J. H. Dowell & Co. appellants, vs. C. E. Mitchell, adm'r de bonis non of C. S. Barron, dec'd. Filed 17th February, 1880. E. Arkansas C. C. U. S.

Supreme Court of the U. S.

OCTOBER TERM, 1881.

No. 221. C. E. MITCHELL, ADMINISTRATOR OF C. S. BARRON, APPELLANT.

vs. *Appeal from Circuit Court for Eastern District of Arkansas.*

J. H. DOWELL & CO., APPELLEES.

No. 467. J. H. DOWELL & CO., APPELLANT.

vs. *Appeal from the same court.*

C. E. MITCHELL, APPELLEE.

ARGUMENT FOR MITCHELL.

CLARK & WILLIAMS,
Attorneys.

Supreme Court of the U. S.

OCTOBER TERM, 1881.

No. 221. C. E. MITCHELL, ADMINISTRATOR OF C. S. BARRON, APPELLANT.

vs. *Appeal from Circuit Court for Eastern District of Arkansas.*

J. H. DOWELL & CO., APPELLEES.

No. 467. J. H. DOWELL & CO., APPELLANT.

vs. *Appeal from the same court.*

C. E. MITCHELL, APPELLEE.

These two cases arise upon the same record, upon cross appeals from the same decree of the Circuit Court of the United States for the Eastern District of Arkansas, in equity.

Dowell & Co., on the 22d day of August, 1877, filed their bill of complaint in this case against Benj. F. Askew, the former administrator of Barron, who resigned pending the suit, and was succeeded by Mitchell as administrator *de bonis non*. Margaret Barron, the widow, and the three children of Barron, with W. H. Brazil, were also made defendants.

The complainants state that in the year 1873, they were cotton factors and commission merchants in St. Louis.

That the same year Claiborne S. Barron and William H. Brazil entered into partnership and began business under the firm name of Barron & Brazil, at the town of Hope, Arkansas.

That in the course of this business complainants became the factors and commission merchants of Barron & Brazil, and made, as such, large advances to them; so, that on the 4th day of October, 1875, said firm was indebted to the complainants in the sum of fifteen thousand, nine hundred and eighty-nine dollars and sixty-two cents. That on that day Barron departed this life, intestate. That B. F. Askew was appointed his administrator. That Brazil, as surviving partner, was left in possession of the business, with a large stock of goods, and a heavy outstanding indebtedness due the firm, which required prompt action and vigorous efforts to collect. That Brazil had a conference with Askew, the administrator of Barron and the widow, and after full deliberation it was agreed that Brazil should continue to run the business, and do all things which he might think proper to wind up and close the business. That Brazil advised complainants of this arrangement, and continued business with them in the firm name. That it was important that *Brazil* should have advances in cash in order to enable him to compete in the cotton market with other merchants in order that he might, by purchases of cotton, payable partly in cash, collect outstanding debts but for which the estate would have sustained heavy losses in failing to collect. That at Barron's death the firm owed over $25,000, and at the close of business in 1876, it owed only about $10,000. That in the course of this business, complainants had advanced to Brazil large sums of money: (the proof shows over $70,000.) That on settlement a balance of $8,446.83 was found due. Ac-

counts current are filed with the bill, which show the whole transaction. (See record page 6 to 13.) That Brazil, on the 15th day of April, 1876, closed the transaction by giving his three notes for the aggregate balance, each note, of the three, being for $2,815.61 due at different future periods. To secure these notes Brazil executed a deed of trust on lots 1 and 2, in block 27, in the town of Hope, containing a large fire-proof store, and cotton warehouse attached, (which was the sole property of Barron.) The bill admits that the legal title was in Barron. (See page 4 of record.) That the mortgage had not been paid, and was due.

That no distinct agreement was ever made between Brazil and themselves as to how credits were to be applied; nor did Brazil ever direct in what way or to what items in said account the *payments made by him were to be applied*, and that in stating said account they made a rest at the death of said Barron, and applied the *credits made* by Brazil to the extinguishment of the indebtedness so incurred by him. In passing we will call attention to the fact that the account beginning on page 6 of record, takes up the account as it was left at the last item on page 11, and ends the account on page 11 with September 6th, 1875, and begins the one on page 6 with same date. This date is nearly one month before Barron's death. So there was not in fact a rest, if that at all altered the case. The bill concludes with usual prayer for accounting and foreclosure. To this bill, Askew demurred on the grounds following:

1st. The complainants sue the administrator for liabilities and transactions of Brazil as surviving partner, without showing such facts as would bind him as such.

2nd. The administrator could not bind himself personally for the liability of his intestate, except in writing,

which is not averred; and there is no such contract shown in the bill as would bind the administrator personally, or in his representative capacity.

3rd. The complainants propose to charge the estate of Barron for business carried on after his death.

4th. The bill asks for a foreclosure of a mortgage on land without showing any legal or equitable right therein.

5th. The bill is otherwise defective.

See record pages 16 and 17.

The demurrer was overruled (see page 18), which was the first error of the court below. Askew, the administrator, answered (see page 19). He denied any agreement with complainants to carry on the business after Barron's death. He admits the partnership of Barron & Brazil; admits that Barron died October 4th, 1875; sets up the fact that Barron furnished $19,692.42 of the capital, while Brazil, a man of limited means, put in $941,61, and drew out of the firm, and was indebted to it $4,340.64; while Barron had only drawn out $11,112.35, leaving a balance due him of excess of capital put in by him, of $8,565.97.

That at Barron's death there was on hand, a stock of goods worth $18,000 estimated at cost, and notes and accounts due amounting to $20,000. That the debts then due from the firm amounted to $26,426.80.

Charges that Brazil did not wind up the affairs of the firm as the law directs; but continued business on his own account, in the firm name, and wasted the assets, with the encouragement and connivance of complainants who well knew the facts.

Avers that the cash advances of plaintiff to enable Brazil to speculate in cotton were a decided detriment to the interests of the old business; that it induced Brazil

to neglect the appropriate and regular means of closing up the business, and incited and induced him to enter into new ventures and speculations, by purchasing at enormous prices and rates, and purchasing generally, without regard to the fact that the *parties* were customers and had any balance coming to them on account of cotton purchased or not, after paying their debts due the firm; so that, by means of this reckless system of dealing, so induced by complainants advancing cash, on the 1st day of June, 1876, less than eight months after the death of Barron, Brazil had collected and disposed of all the assets of the firm, which amounted to about $38,000, (at the death of Barron, on the 4th of October, 1875,) excepting $10,523.62, and was indebted in the sum of $11,720.03, leaving a deficiency of $1,196.41, which showed the result of said eight months business to have been to bring the concern out $1,196.41 worse that nothing; which shows an actual waste and misappropriation of the difference between $26,426.80, the amount of the indebtedness at Barron's death with eight months interest added, and the sum of $38,000, which was the amount of assets on hand at said death, with the sum of $1,196.41 added thereto, not counting interest on the assets, all of which makes a waste of $12,000 or $13,000.

The answer avers that complainants' debt was paid, or novated by Brazil. That his debts were for balances due at the end of the dealing. The answer denies all the material allegations of the bill as to the new business, in detail. Denies that Brazil, or the firm of Barron & Brazil, had any interest in the lots mortgaged, or that Barron ever agreed to convey them; claims them as Barron's private property; claims that all liabilities of Barron & Brazil were paid by shipments of cotton subsequent to Barron's death.

That $54,437.72 worth of cotton was so shipped to complainants, which Brazil paid for, to a large extent, with the assets of the firm.

That in subsequent dealings with Brazil, amounting to $70,000 or $80,000, the complainants had no equities for a final balance. The administrator sets up the pendency of a suit in Hempstead Circuit Court involving this estate, and the subject matter of the suit, and exhibits the record. For this see record, pages 29 to 35, order appointing a receiver, June 20th, 1876, and subsequent decrees, &c.

To this answer there was a replication. Depositions were taken. After filing this answer Askew resigned his administration, and C. E. Mitchell was made a party as his successor. See page 28.

There was a motion to suppress the depositions of J. H. Dowell on the ground that he is the opposite party, and was not called, &c. See record, page 28.

Also to suppress J. Dowell's statements of Brazil's declarations as against Barron, which are marked, also certain statements of Norcum. See page 29.

This motion to suppress, never seems to have been acted upon by the court. There are several depositions in the court, commencing on page 35, to which we will refer in the course of the argument, as occasion may require. We will say here, however, that all the letters of Brazil, written in the name of Barron & Brazil, after Barron's death, on Oct. 4th, 1875, which are exhibited with deposition of Norcum, and all the declarations and statements of Brazil after that date, are clearly hearsay declarations of a competent witness, about transactions other than those had with the deceased, and ought to have been excluded. See pages 38 to 43.

On the bill, answers, exhibits, and depositions, the cause was heard, and a decree rendered, denying the foreclosure on the ground that the lots were the private property of Barron, and a general decree was rendered against Mitchell as administrator for $10,793.17, on account of balance due from the late firm of Barron & Brazil. From the latter portion of this decree Mitchell has appealed; from the former portion J. H. Dowell & Co. appealed, which is docketed here as number 467.

The bill was dismissed as to the widow and heirs of Barron. For decree see pages 34 and 35.

In case 221 we assign the following errors:

1st. The court below erred in over-ruling the demurrer of defendants below.

2nd. The court erred in neglecting and refusing to suppress the depositions of Norcum and others, in so far as they detail conversations with, and letters of, Brazil.

3rd. The court erred in rendering a decree against the administrator for the balances due from Brazil.

4th. The court erred in maintaining jurisdiction over the cause, when it was shown that the subject matter of the suit was in the hands of a receiver appointed by the State Court.

As to the first assignment of error we shall say but little here, as the question involved is raised upon the 3d assignment, and will be further noticed there: suffice it to say that the bill disclosed on its face that the complainants had full knowledge of Barron's death, and that Brazil alone, as surviving partner, was carrying on the business, as Barron & Brazil, for the purpose of winding it up, and that it was through their aid in advancing to purchase cotton, &c., that much was col-

lected. They knew and connived at Brazil using the assets of the old firm in a new business. See record, pages 1 to 4, especially pages 2 and 3. They disclose and admit, that the pretended agreement with Askew and Mrs. Barron, to continue the business, was only for the purpose of "*winding up*" and "*closing out.*" See record, top of page 2. To "wind up" and "close out" was certainly not to do a new business of $71,562.78, as disclosed on page 10 of the record, in Exhibit B--a much larger business than was done in the same period by the old firm. The complainants were bound to know the law, and that law, both statute and common, forbids a surviving partner to launch into a new business, use the assets of the old concern in it, and leave debts unpaid. Complainants say expressly, at page 2, that they made their advance for the benefit of Barron's estate. Besides, notwithstanding the complainants pretend that they made a rest at Barron's death, and kept the account anterior thereto separate, open, and unpaid, yet it is evident, if the court will compare the account on page 11 with the one ending on page 10, that the last is but a continuation of the first named on page 11.

That one ending on September 6th, 1875, nearly a month before Barron's death, and the first item of Exhibit B, on page 10, is composed of the balance of account rendered, as on page 11, and the account is an unbroken account current, from June 10th, 1875, to April 15th, 1876. This is the account taken from their books which they swore to, and made a part of their bill, and is more convincing than after-thought testimony. As to this too, they disclose, on the face of the bill, (see page 3,) that no distinct agreement was ever made between Brazil and themselves as to how credits

were to be applied, &c. In that case the law applies them to the oldest debt, as we hereafter show.

Lastly: the complaint shows that Brazil had novated the debt by giving notes which could only bind himself. So the demurrer should have been sustained as to that portion of the bill which claimed the personal liability of Barron. It should have been sustained as to the mortgage. For the bill failed to disclose a contract to convey by Barron, and part performance, but as the court on final hearing decreed in our favor upon that branch of the case, we will defer further discussion until we come to argue case 467.

2nd. The court erred in refusing or neglecting to suppress certain depositions.

Under this assignment, we beg leave, for convenience, to copy all we said in our brief in the court below, bearing upon the subject of evidence, whether it applies directly to our objections, to complainant's depositions, or may be in response to objections to ours, and will ask leave here to group the entire subject of evidence, as applicable to cases 221 or 467, as the depositions all come consecutively in the record. The court will doubtless find this the most convenient method of treating the subject.

Neither J. H. Dowell nor Brazil are competent witnesses against the administrator of Barron as to any transaction had with Barron in his lifetime. Dowell is the opposite party, and we have not called upon him to testify, nor has he been required to testify by the court.

U. S. Revised Statutes, sec. 858; Constitution of Ark.

It will not do to say that Brazil has conveyed his interest and is a co-defendant, and is therefore an opposite

party to plaintiff, who calls him. Under Brazil's conveyance to Dowell & Co., their interests are identical and Brazil is bound to make good his conveyance. Such is the identity of his interest with plaintiffs that, at common law, he would be incompetent to testify for them. That is the true test of disqualification. The use of the words bargained, sold and granted in the deed carries an implied covenant.

Gantt's Digest, sec. 829; see Appendix, B. 2.

If the common law closed Brazil's mouth on account of interest, the statute does not open it, unless he be called by the party who opposes that interest, or is required to testify by the court. If this were not so, all that a party in such case would have to do would be to be made a party opposite in form to evade the statute and destroy its real effect. In equity a lawyer, drawing a bill, has the option to make all parties in interest but one person defendants, and to make that one the plaintiff, no difference how diverse and hostile the interests of the co-defendants might be. This would be an easy and cheap way of rendering a witness competent who was otherwise incompetent—simply make him an opposite party. This would let in all the mischief which the exception in the statute was intended to prevent—that is, where death has closed the mouth of one party, the statute closed the mouth of the other by leaving him to the full scope and effect of the rules of the common law, which disqualifies a witness on account of interest. No one will question the justness of the statute in closing the mouth of the living as against the dead, as to all transactions had with him.

That both these witnesses are incompetent at common law is clear. 1 Greenleaf Evidence, sec. 329; Ib. 386 390, 392, 393.

Under the chancery practice, before this statute, parties might be examined, either plaintiff or defendant, by order of Court upon affidavit that the party called to testify is not interested on the side of the applicant for the order to take the depositions of such party. 1 Greenleaf, sec. 361.

But here no such affidavit could be made, for Brazil had warranted his title and was bound to plaintiffs, interested with them and disqualified as a witness. 1 Greenleaf, secs. 393,395, 397.

Mr. Greenleaf at section 397 of the 1st volume of his work on evidence, uses this language:

"Thus, the warrantor of title to the property which is in controversy, is generally incompetent as a witness for his vendee, in an action concerning title, and it makes no difference in what manner the liability arises, nor whether the property is real or personal estate."

Brazil is clearly disqualified as a witness on the ground of interest, even if he had not warranted the title; for if plaintiffs succeed, he gets half the store-house of Barron upon his own oath alone, for there is no testimony but his as to this, and to the extent of its proceeds he is relieved of debt.

Again, he throws upon Barron's estate by his testimony, and off himself, all the debts created by him, existing at the end of that unfortunate eight months of trading which he carried on without authority, in the name of Barron & Brazil, after Barron's death, and relieves himself of one-half of it, even supposing that he is solvent and must ultimately account to Barron's estate for every excess. These interests, in common with plaintiffs, disqualify Brazil as a witness in their behalf as to these matters. If he is disqualified at common law, he is within the exceptions of the statute. The statute is as follows:

In the Courts of the United States no witness shall be excluded, etc., * * * in any civil action because he is a party to, or *interested* in, the issue tried; provided, that in actions by or against executors, administrators or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the others as to *any transaction with*, or statement by, the testator, intestate or ward, unless *called* to testify *thereto* by the *opposite party*, or required to testify thereto by the Court.

Now, we submit that the word "opposite" in this act necessarily means opposite in interest, and not merely opposite in the cause as matter of form. If we are right in our construction, then Brazil is clearly opposite in interest to us and incompetent. If the statute does not mean that, then the proviso had as well been left out, for it does no good, being so easily evaded, as we have shown, and substance is sacrificed to form.

We except to all that part of the depositions of J. H. Dowell and Henry T. Norcum which refers to letters and statements of Brazil and others, for they are but heresay. Mr. Brazil, at the time of making them, was not engaged in any act which would bind Barron or make him his agent, for he (Barron) was dead.

The declarations of an agent only bind the principal when made in the course of employment, and while engaged in the very act to which the declaration refers, *dum opus ferret*. 1 Greenleaf Ev., sec. 113; Campbell vs. Hastings, Britton & Co., 29 Ark., 513.

Whenever the partnership was dissolved by death, as well as by its own limitations, the acts or declarations of an individual member of the partnership ceases to be evidence against another member, and ceases to bind him. 1 Greenleaf Ev., 111.

And the authorities hereafter cited upon the point of the effect of the dissolution show, conclusively, that Brazil could not bind Barron by act or declaration after Barron's death.

Besides, Brazil, as to these matters, was a competent witness, so was the other party whose report was referred to by Norcum. Brazil was competent to testify this, if the testimony was competent, because it did not refer to declarations of, or transactions had with, the deceased, but to acts which transpired after his death, and are therefore not within the exception of the Act of Congress.

Brazil's letters and admissions are evidence against himself, of course.

"Yet where there are several parties on the same side, the admissions of one are not admitted to effect the others, who may happen to be joined with him, unless there is some joint interest or privity *in design* between them, although the admission in a proper case may be received against the person who made them." 1 Greenleaf Ev., sec. 174.

These statements of Brazil come within this rule. There was no joint interest or privity in design here. All these declarations of Brazil, in so far as they are used against Barron, were declarations made by Brazil in his own favor, to charge Barron with half the liabilities, and to that extent a declaration in his own favor. He was not the agent of Barron, and the admission was not made about a joint interest or where there was privity of design; therefore, this evidence must be excluded. It is a noteworthy fact that although Brazil was introduced as a witness, he utterly fails to prove or swear that he had any authority to act for Barron's estate; his testimony falls far short of this.

In the depositions of several witnesses taken in behalf of defendants, there were several questions and answers to which the plaintiffs objected on the score of competency.

Thus, Martin Hartin was asked:

Question—State what was said by C. S. Barron, the deceased, at the time the contract was entered into.

Answer—When the contract was read over and Mr. Barron discovered that it was drawn in the firm name of Barron & Brazil, he said to Dr. Archer, who had drawn the contract, that that part was wrong; that he was doing that building himself, and that he had a deed to the lots upon which the house was to be built, and when Dr. Archer replied that he did not know that, Mr. Barron said, let it go along, we can fix that any time.

To which question and answer plaintiffs excepted.

Question by Defendants—Did he say anything further at that time upon that subject?

Answer—He said further, that although it was generally understood that he and Brazil were partners in business, yet Brazil's interest was comparatively small, and he wanted it distinctly understood that he was building that house himself.

To which question and answer plaintiffs excepted.

And R. R. Archer, in his deposition, uses this language: "Mr. Barron being referred to, said it was all right, with the exception of the Brazil part (referring to Brazil's name in the building contract); that Brazil had nothing to do with it. I suggested that the contract be rewritten. Mr. Barron said no, that they contemplated some changes in the plan (that is, he, Hartin & Seawell, the contractors of the building); that they were thinking something about an iron front, and

when these changes were agreed upon the contract could be fixed, but that he wanted it distinctly understood that that building was his, and that Brazil had nothing to do with it. These declarations were made by Mr. Barron immediately before signing the contract. I saw Seawell & Hartin, and Barron sign the contract.

To this plaintiffs excepted.

Jesse L. Ellis, after he had stated that he was book-keeper of Barron & Brazil, and had testified fully as to their business transactions with plaintiffs, was asked:

Question by Defendant—Were you ever instructed, as book-keeper, to charge Mr. Brazil with the half, or any part, of the purchase-money for lots 1 and 2, in block 27, on which the brick store-house is built?

Answer—No.

Question by Defendant—Did you ever hear either Barron or Brazil say anything about Brazil having purchased an interest in said lots?

Answer—No.

To which plaintiffs excepted.

George M. Ellis, another clerk and book-keeper of the firm, after proving that fact, and testifying about the business, was examined by defendants, as follows:

Question by Defendants—Was there any instructions or directions given you as to how the accounts between the contractors for the building and the store-house, and the firm of Barron & Brazil should be kept, and what final disposition, if any, was to be made of them?

Answer—The first bill that was purchased by the contractors was entered on the blotter and charged to C. S. Barron, amounting to something less than a hundred dollars. I then suggested, that as Martin Hartin, J. P. Seawell, and Seawell & Hartin had, or would have, accounts there, that it would be best to charge all bills,

on account of the brick building, to Martin Hartin, J. P. Seawell, and to Seawell & Hartin, as the case might be, until said building was complete, and then, that the whole amount of said accounts paid out of the store, or by the firm of Barron & Brazil, on account of said building, should be charged to C. S. Barron on the books of said firm. Mr. Barron agreed to this suggestion, and directed me to make the charges accordingly. I do not know whether Mr. Brazil was informed of these instructions by Mr. Barron or not. He was not present at the conversation referred to.

Question by Defendant—Were you present at any time when there was a contract made, or conversation had, in regard to an iron front, between one Mr. Howard, the representative of an iron house in St. Louis, and Mr. Barron, and if so, what was said?

Answer—Mr. Barron agreed to take the iron front, and Mr. Howard suggested that he should have the firm name of Barron & Brazil cast upon the front, to which Mr. Barron objected, and stated that if any name was to be placed upon the building it should be C. S. Barron. Mr. Barron afterwards stated to me his reason for this was, that as soon as the house was completed the business would be changed.

To the last question and answer plaintiff excepted, thus practically conceding the legality of the first, which was clear, for if the fact that the building was paid for out of the store by articles of merchandise, material or money advanced and charged to the contractors individually, or as a firm, as the articles may have been from time to time gotten, either for the use of an individual partner or the joint account of the contractors. It was legitimate and material to prove, that the whole was to be charged to Barron on the

completion of the building, especially in view of the fact that the first item was properly charged to Barron, and the change in the method of entering the charges was made by the book-keeper. Contemporaneous declarations and explanatory statements that were concomitant with the act, and explanatory of it, were admissible.

Mrs. Aubry stated, that while the building was in process of construction, Barron stated that he was building it for his wife and children.

This was objected to by plaintiffs.

We must bear in mind that plaintiffs claim that Barron, being the owner of the ground, proposed to build a store-house on it at the expense and for the use of Barron & Brazil, and to charge the firm with the cost of the lots; that the building was put up and paid for out of the firm goods, and that the acts of Barron in superintending the erection of this building were acts in part performance of the parol contract to convey the lots. The proof shows that the firm never took possession until after Barron's death, and consequently after the firm was dissolved, and the entry in the books of the late firm—charging the expense of the building to real estate account of Barron & Brazil—was not made until November 5, 1875, one month and a day after Barron's death. Brazil, after the death of Barron, mortgaged these lots and the new brick store upon them, or upon parts of each, and this suit is to enforce that mortgage.

Now, it becomes very material to know whether these goods which were bought by Hartin & Seawell in payment for the building, and delivered to them out of the stock of Barron & Brazil, was a firm account, or an account of Barron alone. It becomes important to

ascertain whether Barron's acts in putting up that building, making the contract, superintending it while in process of building, were acts in his own behalf or for the firm. The declarations of all persons contemporaneous with the acts, and explanatory of them, are part of the *res gestæ* and admissable as evidence.

The contemporaneous declaration of Barron while he was building and superintending it, as to his intentions, is a part of the *res gestæ*. They were directly connected with the matter in hand, and explanatory thereof, and illustrated the character of the acts. And such declarations are clearly competent evidence. See 1 Greenleaf Ev., sec. 108.

They were also the declarations of a party in possession of land at the time they were made and connected with it, explaining the character and nature of that possession, and it is no difference that the declaration was in his own favor. 1 Greenleaf. sec. 109.

These declarations were not narratives of a past occurrence, but were concomitant with the acts of building and having possession of the lots, and so connected with them as to be regarded as the mere result and consequence of the co-existing motive. 1 Greenleaf, sec. 110.

Now, if the acts of Barron in building here was not an act of possession and part performance for the firm, where is the act to be found? There is not a word of proof tending to show that Brazil ever set foot on the lots until after Barron's death, when he moved the goods into the new store. But it cannot be claimed that Barron was acting for the firm, for he superintended it all personally, and his contemporaneous and concomitant declarations explain his acts and prove

that he was acting for himself, and not for Brazil or the firm.

3rd. The court erred in rendering a decree against the personal estate of Barron. Barron & Brazil were commercial partners at Hope, Arkansas, under an agreement entered into on the 4th day of October, 1873, to continue two years from that date. (See record, pages 25, 26). Barron died on the 4th day of October, 1875, whereby the partnership was dissolved, both by the limitation contained in the first article (see page 26), and by death. It is claimed by Dowell & Co., that at Barron's death the firm was indebted to them in the sum of $15,000 and over. After Barron's death Brazil continued the business as surviving partner in the name of the firm, and, in violation of the 7th article of the partnership; extended it to large cotton speculations; outside of the plantation supply business to which the articles confined it. After dealing sometime with complainants, in which they say they made *large advances upon the credit of*, and for *Barron's estate*, involving transactions amounting to $71,562.78, as shown by the account exhibited which contains an extension of $13,543.87 of old indebtedness prior to September 6th, 1875.

On settlement, after about eight months dealing, *Brazil* was found in debt about $8,000, and gave his notes, signed Barron & Brazil, to plaintiffs, for the amount, and gave a mortgage on the lots above mentioned. In addition to the grounds assumed above, on the 1st assignment of errors, we contend that Brazil had no power or right to bind the firm or the estate of Barron after death, or use the partnership assets in new ventures, as complainants aver he did with their connivance for the benefit of *Barron's estate*.

By that allegation they make themselves irrevocably

privy to Brazil's usurpation of power, and waste and misapplication of assets, and no evidence can be considered that varies, or contradicts this allegation.

There must be, after death, an entire cessation of trade, as there is of power to bind the dead partner, on the part of the survivor.

> Story on Partnership, sec. 343;
> Collyer on Partnerships, secs. 130, 131.

And under administration laws of Arkansas (see title administration, Gantt's Digest) neither Barron's widow nor administrator had any power or right to trade for the estate. They might have bound themselves individually, but could never deal as merchants for the estate.

Besides the proof shows they did not do it. See Story on Partnerships, secs. 317, 318, 343, 344, 328.

If a surviving partner undertakes to carry on business upon partnership assets after dissolution by death, the representative of the deceased partner has a right to an election as to whether he will take profits on the business or interest on the amount due him. Birnie vs. Vandever, 16 Ark., 616.

The same rule ought to apply, surely, to losses. Here there is proven to be personal assets to an amount nearly thrice the amount of the debts. Counting the goods at cost and carriage, and debts at their face, there was over $38,000. The goods were fresh and marketable, and were mostly sold at a profit of 30 per cent. The debts were mostly collectable. To these personal assets may be added the value of the wooden store on lot 4, block 28, in which the business was carried on up to Barron's death, which belongs to the firm, with said lot 4. Instead of applying the assets to the debts, Brazil novates the old debts by giving his notes, wastes the property

in unprofitable trade; all this with the connivance, consent, encouragement and assistance of plaintiffs, and now they ask us to yield our election to take the amount due us and interest; and after wasting about $12,000 over and above all debts (see Ellis' deposition), propose to visit the whole loss on Barron's estate. The assets, exclusive of real estate, were $38,000; the debts were $26,426.80. Of this $38,000, $18,000 was goods on hand, to which must be added 30 per cent. (see deposition and exhibits to J. L. Ellis' deposition) profit for which goods sold, making $5,400. making the money realized by Brazil reach $43,000, from which deduct the amount turned over to the Receiver, and we have about $32,000 cash actually used by Brazil—an excess of over $6,000 more than was necessary to pay the debts, leaving the real estate untouched—is here shown. Instead of this excess being on hand for Barron's estate, we have the plaintiffs' debt, if their claim be true, and some $3,000 more of debts unpaid to be added to the loss. The question is not whether Brazil has managed well or ill, but it is simply, did he trade on his own account, and could he bind Barron's estate by his acts?

He gave his own notes and they were accepted. He had the means of Barron to meet them, and, in fact, did so, for the accounts show that this debt claimed is a balance left after eight months business, involving between $50,000 and $75,000. In the face of this account and their own statement in the bill, it is rather strained and far-fetched for Dowell & Norcum, plaintiffs' witness, to undertake to trace some old notes which were given in Barron's lifetime as the identical consideration of the new notes. The pretence amounts to nothing, as Brazil novated the contract. But it is simply ridiculous. The notes were credited originally, and when they came back

were charged back in a running account. Why did these notes enter into the balance any more than any other item? Why were they not liquidated in that $32,000 plaintiffs got of Barron's money? For it was really all his, as we have shown.

The new notes were Brazil's own, for, although he signed them "Barron & Brazil," he had no power to bind Barron, nor could he, after dissolution, have bound Barron by such a note, even if Barron had been living. For he would not have been his agent for any such purpose. This is well settled. See Burr vs. Williams, 20 Ark., 172, where the precise point was involved. Story on Partnerships, 324 and note; Bell vs. Morrison, 1 Pet., 351.

In case of death of one partner, the rule is stronger; for death destroys all agencies except powers coupled with interest, and more especially does this apply to real estate. Joint real estate interest cannot be mixed up with a settlement of partnership affairs. Jones vs. Jones, 23 Ark., 212.

The common law rule was, that on death of a partner, a creditor had no right at law against his private estate, and his remedy was alone against the survivor; and it was long disputed whether the joint creditor had any remedy, even in equity, against the deceased's estate. McLain vs. Carson, 4 Ark., 164; Collyer on Partnerships, 337.

And it is only upon the principal of subrogating the creditor to the right of a partner that equity originally interfered. Gray vs. Chiswell, 9 Vesey, 118; *Ex parte* Kendall, 17 Vesey, 519; Jacomb vs. Hartwood, 2 Vesey, 265.

But later cases in equity treated the debt as joint and several. Collyer Part., 338.

This common law rule of treating partnership contracts as joint, and not several, which resulted in the liability ceasing with death of one partner, as to the dead, and surviving against the other living partner, was one of those incidents of joint tenancy, that run through the whole law, as to real property, and to some extent as to personal property. This surviving liability for all the debts is one of the reasons for giving to the survivor the control of the assets at common law. That he had the assets was also the reason for his sole liability. Our statute has made all obligations joint and several. Under our statute joint obligations are made joint and several, and the common law rule above indicated has been expressly changed. Gantt's Dig., sec. 3,585; see appendix, F. 6.

This section expressly gives a right of action against the administrator of a deceased joint obligor, and it is only by virtue of this statute that the partnership creditors would have any rights against Barron's estate at all, and that liability of Barron's administrator exists only upon the original joint contract and inhered in it, and is canceled when it is canceled or satisfied, or novated. Under the statute, a partnership creditor might pursue Barron's estate to final payment, leaving Brazil in possession of all the assets of the firm, and exhaust Barron's private estate first. Therefore it would seem that the reason for the surviving partner controlling partnership property having ceased, if the law does not cease with it certainly it should not, now and here, be extended over realty, so as to allow a surviving partner to dispose of joint real estate in violation of the law. For even after the abolition of joint tenancy and survivorship, and in every State where the statute has abolished joint tenancy as ours has, and with it survivorship, it is held that there

is no power in the survivor to convey realty of the partnership or to mortgage it.

Now, there can be no pretence of any claim against Barron's administrator, as such, nor any right to a general decree against his personal estate, because:

First—This bill is to foreclose a mortgage, and nothing more, and if plaintiffs fail to sustain the validity of that mortgage they must go out of Court.

Second—There is no sufficient affidavit of justness and non-payment of claim, such as the statute requires, and the scope and prayer of the bill involves no idea of a personal and general decree against Barron's administrator. Nor could any such decree be predicated upon the facts stated in the bill, for there is no personal liability of Barron set up in the bill.

We submit that when the plaintiffs settled with Brazil and took his notes, the real balance was on the new dealings of Brazil, and was not a matter of Barron's, in any form or shape it could have been put; and even if Barron was liable on some part of the old account, still the settlement and the taking of his new notes in satisfaction, without reservation or qualification, was a novation, and Barron's estate is not bound. For it cannot be contended that Brazil had a right to bind Barron on a new contract, or to bind his administrator after he was dead; and as Brazil got $43,400, independent of real estate, with which to pay $26,426.80, he had no equities against Barron to which plaintiffs could be subrogated, even if the doctrine of subrogation could apply here. On the contrary, the equities are all the other way—in favor of Barron against Brazil.

The creditor by receiving the debtor's note or the obligation of a third person in payment of the debt, novates it, thereby extinguishing it with all its accessory

rights, and he retains only a personal action against the parties to the note or obligation. Cammach vs. Griffin, 2 La., Ann., 175; Elam vs. Caruth, Ib., 275; White vs. McDowell, 4 Ib., 543; Turner vs. Lewis, 6 Ib., 774, Terrill vs. Gambin, 10 Ib., 623; Lawson vs. Dale, 3 John Ch., 23; 17 John., 437; Westfall vs. Parson, 16 Barb. (N. Y.), 645; Stone vs. Russell, 36 Ill., 18; Hargrove vs. Conrey, 19 N. J. Equity, 281; Banorgee vs Hovey, 5 Mass., 11; Berry vs. Bacon, 28 Mass.

The case last cited holds that where a deed of trust is given to secure a pre-existing debt, it was a novation and merger *in so* far as it affects the trust property. So here these notes and deeds of trust were executed by Brazil alone, it was a merger of the old debt and satisfaction of it. Barron was not bound by Brazil's acts, because the firm was dissolved. The above authorities show that the power to bind ceased even upon voluntary dissolutions, therefore these notes were not binding upon Barron's estate, nor upon his interest in the realty (as to that it is simply void), and the old debt could not bind the property, for the mortgage was not given to secure that. If Barron's estate is liable at all, it is on the original notes for $5,000 each, which were unquestionably merged and novated. In truth, this suit is not upon these notes, and the record here will be no protection against a suit on them against Barron's estate, if they are not satisfied. If plaintiffs have any claims against Barron, they must assert them as they existed at Barron's death. They have been satisfied by Brazil and with plaintiffs' assent, and Brazil has had ample assets to pay it with, the bulk of which plaintiffs have received, and that three times over. There are no equities in favor of Brazil, none in favor of plaintiffs, through him or otherwise. For it is averred and proved that they

were prime actors with Brazil, and have made these ventures and failed to make all they expected. It is not becoming or just for plaintiffs to claim that the law must be bent to suit their case, especially in view of the fact that it is proved that a loss of near $3,000 has been sustained by their neglect to obey positive orders to sell cotton at once, thus inflicting thereby a loss of $10 or $12 per bale on 300 bales.

Finally, we claim that the old indebtedness was all paid in the course of these dealings, for there is no proof that either Brazil or the plaintiffs, at the time, exercised their right of appropriation. On the contrary, Dowell & Norcum take pains to prove that there was no appropriation.

In the case of Cremer vs. Higginson, 1 Mason, 338, Judge Story lays down with much precision the general rules governing them:

First—A debtor who owes his creditor money on distinct accounts may direct his payments to be applied to either, as he pleases.

Second—If the debtor makes no appropriation, the creditor may apply the money as he pleases.

Third—If neither party makes a specific appropriation of the money, the law will appropriate it as the *justice* and *equity* of the case may require.

These rules apply, although one of the debts be due on specialty and the other on simple contract. 2 Parsons' on Contract, page 629, and note L, with authorities there cited.

Here the proof fails utterly to show any appropriation by Brazil. That plaintiffs made no appropriation of payments to any particular debt is evidenced by their own general account, with debits and credits, including old and new business alike, besides the admissions in their

bill. Barron's funds have all been used in paying it and if the rule laid down by Judge Story obtains, then, surely, the equities are with us. But in this case we are not left to reason from analogy. For *ita lex scripta est.* Mr. Parsons says:

"It seems to be *settled*, that where one of several partners dies, the firm being in debt, and the surviving partners continue their dealings with a particular creditor, and the latter blends his transactions with the firm before and after such death together, the payments made from time to time by the surving partners *must be applied to the old debt.*" 2 Parsons' on Contracts, page 633.

The court will find that Mr. Parsons is well sustained in this asertion, and this, we think, is conclusive of this case.

When, as is distinctly stated in the bill, no application is made of payments by either party, in case of dissolution of partnership, the *law applies it to the first item*: *Story on Partnership, section* 157; *Clayton's case,* 1st Merivale, 572; Alcott vs. Strong, 9 Cushing, 323; Stanwood vs. Owen, 14 Gray, 195. At page 321 of his work on partnerships, 3rd edition, Mr. Collyer says; "the appropriation must be made *at the time* of payment: otherwise the law makes the appropriation" as above indicated. See note to *section* 157 *of Story on Partnerships,* where this whole subject is fully discussed, sustaining our position. The novation released Barron's estate. Story on Partnerships, 158, 159.

Fourth—The court erred in maintaining jurisdiction. In the suit pending in Hempstead Circuit Court, a transcript of which is exhibited with the answer (see record pages 29 to 34), the subject matter of this suit was involved, and that court had jurisdiction of the *res,* all the property and effects, rights and credits of Barron

& Brazil, and a receiver had been appointed who had posession and charge of it. Complainants below had a right to intervene in that suit—under the provisions of sections 4481, 4482, of Gantt's Digest,—for which see appendix A, 1, Taylor vs. Carrel, 20 Howard, 583; Mallet vs. Dexter, 1 Curtis, 178; *ex parte* Robinson, 6 McLean; Board vs. McMasters, 4 A. Law Register, 708. Shelby vs. Bacon, 10 Howard, 56; Peale vs. Phipps, 14 Howard, 368; 23 Howard 90.

We contend that this cause should be reversed and submit the question.

No. 467.

In this case, as to so much of the decree, as refused to foreclose the mortgage, we will submit to this court an exact copy of our brief, in the court below, upon this point, with every confidence that we will be able to convince this court, as we did the court below, of the rightfulness of our contention.

This is an effort to foreclose a mortgage on lots 1 and 2, block 27, in Hope, Arkansas, which mortgage was executed by Brazil, surviving partner, after the death of Barron, to secure about $8,000 balance, claimed to be due from Brazil at the end of several months dealing after Barron's death.

Barron & Brazil were commercial partners at that place, under an agreement entered into on the 4th day of October, 1873, to continue two years from that date. Barron died on the 4th of October, 1875, at which time, it is claimed by plaintiffs, Barron & Brazil were indebted to them in the sum of over $15,000. After Barron's death, Brazil continued the business as surviving partner in the name of the firm, and after dealing some time with plaintiffs, involving transactions amounting to be-

tween $50,000 and $75,000. Brazil was found in debt about $8,000, and gave his notes, signed "Barron & Brazil," to plaintiffs for the amount, and gave a mortgage on the lots and brick store-house in controversy to secure it. It is shown beyond controversy, and admitted, that the legal title in the lots was in Barron at his death. It is claimed by plaintiffs that Barron had agreed, by parol, to transfer the lots to the "*firm*," and this agreement was by parol, and that the brick building was put up by the firm as an act of part performance.

Now let us examine the law regulating such contracts and see whether there is here such a contract as a court of equity is called on to perform, and whether it is sufficiently proven.

Then conceding, for the sake of argument, that there is an equity here, next let us inquire whether one partner can sell the realty of the firm or mortgage it alone.

We rely upon the statute of frauds. Gantt's Digest, sec. 2951; see appendix, C, 3.

It is claimed that part performance has taken the case out of the statute. We submit: *First*—That no contract is proved of any kind, even giving Brazil's testimony the widest latitude, and it fails to show a parol contract; it lacks definiteness as to the buyer. He says it was to be conveyed to the firm, that was composed of Barron & Brazil. Was Barron to convey to himself? Was Barron to pay himself for one-half, and convey that half to himself? It lacks mutuality. Barron could not have enforced it against Brazil. It is uncertain as to price, and, lastly, there is no proof of possession delivered by the vendor to the vendee, if, indeed, there was a vendor and a vendee.

We have collated the authorities on several views of this question, and will give them as we gather the points

John. Ch. Rep., 370; Colson vs. Thompson, 3 Wheaton, 336, 341.

Generally, the payment of the purchase money, the delivery of possession and making valuable improvements must all concur, and the delivery of possession must come from the party bound to convey. 1 Cranch Circuit Court Rep., 219; Johnson vs. McGruder, 15 Mo., 365; Blount vs. Tomblin, 27 Ill., 93; Mason vs. Blair, 33 Ill., 194; Finncane vs. Kearney, 1 Freeman, Miss., Ch., 65; Massey vs. McIlwaine, 2 Hill (S. C.) Ch., 421; Outerhouse vs. Burleson, 11 Texas, 87.

The possession must be exclusive. Haslet vs. Haslet, 6 Watts (Pa.) 464.

The courts have regretted that part performance of a parol contract was ever allowed to form an exception to the operation of the statute of frauds, and it will never be carried any further than to prevent fraud. Therefore, the contract must be clearly proved, as well as the acts of part performance; and the acts of part performance must have been done with reference to the contract and under it, and if it is doubtful as to whether the acts, claimed as part performance, were done under the contract and referrable to it, or on some other account, the courts refuse to decree performance. This is the clear and uniform result of all the cases. See Keatts vs. Rector, 1 Ark., 391; Wallace vs. Brown, 10 N. J. Equity (2 Stock.), 308.

Possession obtained exclusively under the contract, especially when the vendee has made repairs and improvements, will take the case out of the statute. Ib.

But mere payment of purchase money is not sufficient. Ib.; Underhill vs. Allen, 18 Ark., 533.

Possession obtained wrongfully is not a part per-

formance. Keatts vs. Rector, *ubi sup.*; Blakeney vs. Ferguson, 8 Ark., 278.

To take the case out of the statute, the party claiming must show acts *unequivocally referring* to *and resulting from* the *agreement* set up, such as the party charged would *not have done unless on account* of that very agreement and with a view to its performance; and the agreement set up must be *proved to exist*, and appear to be the only matter to which the act claimed as part performance refers. Sheppard vs. Sheppard, 1 Md., Ch. 244; Carlisle vs. Fleming, 1 Harrington (Del.), 421; Beard vs. Linthicum, 1 Md., Ch. 345; Small vs. Owing, Ib., 363; Stoddart vs. Tusk, 4 Ib., 475; Chesapeake Co. vs. Young, 3 Md., 480; Harris vs. Knickerbocker, 5 Wendell (N. Y.), 638; Phillips vs. Thompson, 1 John. Ch., 131; Parkhurst vs. Van Cortlandt, Ib., 274; Byrne vs. Romaine, 2 Edwards (N. Y.), 445; Rathbun vs. Rathbun, 6 Barbour (N. Y.), 98; Ellis vs. Ellis, 1 Dev. (N. C.), Equity, 180; Church of Advent vs. Lawson, 7 Rich. (S. C.), Eq., 378.

One who seeks equity in such case must come with clean hands and show a full performance on his part of all obligations, and not, as in this case, show he never paid anything, and that the improvements were made out of Barron's means, for Barron had furnished all the capital, while Brazil had drawn $2,603.52, and had put in only $342.66 up to the 4th of October, 1875, and up to the 22d day of June, 1876, when the Receiver of Hempstead county took charge, he had put in only $941.61 in all, and had drawn out $4,340.64, while Barron had put in $19,682.42, and drawn out $11,127.35 as shown by their books. (See testimony of J. L. Ellis). Add to this the $6,802.50, the cost of the building, would make only $17,929.85, which would leave the

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concern a debtor to Barron, on the 4th of October, 1875, $1,752.67. Brazil was debtor to the firm on that day, over and above all credits, $2,260.86. Besides all this, Brazil had never complied with his agreement to put in half the capital.

Clearly hands are not clean here on the side of the plaintiffs, on this account, and no performance of his part is shown. See Boone vs. Missouri, Iron Co., 17 Howard, 340; Garretson vs. Van Loon, 3 Iowa, 128; Vennum vs. Babcock, 13 Iowa, 194; Greenup vs. Strong, 1 Bibb (Ky.), 500; Bearden vs. Wood, 1 A. K. Marsh., 450; Rogers vs. Saunders, 16 Me., 92; Stewart vs. Raymond, 15 Miss. (Sm. & M.), 568; Tyler vs. McCurdle, 17 Miss. (Sm. & M.), 230; Earle vs. Halsey, 14 N. J. Eq. (1 Mc.), 332; Thorp vs. Pettit, 16 N. J. Eq., 488; Cox vs. Boyd, 38 Ala., 42; Jordan vs. Denton, 23 Ark., 704; Stevenson vs. Dunlap, 7 T. B. Mon. (Ky.), 134.

He must come with clean hands. Kitchen vs. Coffin, 4 Ind., 504.

This prior performance on the part of the vendee is most rigidly enforced as to time, as well as matter. Simmons vs. Hill, 4 Har. & M. (Md.), 252; Lewis vs. Wood, 5 Miss. (4 How.), 86.

The bill is defective in not averring payment of price to Barron, as the bill is in behalf of a sub-purchaser. Frazier vs. Broadanax, 2 Litt. (Ky.), 249; Passmore vs. Moore, 1 J. J. Marsh. (Ky.), 591.

And the offer to pay in the bill, under the circumstances of this case, is not sufficient. Ely vs. McKay, 12 Allen (Mass.), 323; Jones vs. Lynde, 7 Paige (N. Y.), 301.

There was here no mutuality. Barron could not have compelled Brazil to pay him anything for he does not even pretend that any price was agreed on, or that

Barron could have enforced the payment of one dollar of the purchase money against him under the contract. Cooper vs. Pena, 21 Cal., 403.

Even if insolvency renders it uncertain about his ability to pay, yet this mutuality of obligation must exist, in fact, before the contract can bind either party. The contract must not only be mutual, but clear and definite as to price. Hubbard vs. Gray, 21 Ark., 501.

When a price is not agreed on, equity will not decree specific performance. Sims vs. McEwan, 27 Ala., 184; Hubbard vs. Gray, 21 Ark., 501.

As to what evidence may entitle a party to specific performance, it will be found by comparing the testimony with the rules laid down in these and other decisions that plaintiffs have utterly failed to prove the case. See Lee vs. Dodge, 5 Wallace, 808; Whately vs. Strong, 23 Ark., 421.

Courts reject *all parol evidence* in such cases, unless it establishes a *clear* exception to the statute of frauds. Poorman vs. Kilgore, 26 Pa. St., 365; Allen vs. Chambers, 4 Ired. (N. C.), Eq., 125.

It devolves on plaintiffs, and the burden is on them, to prove the contract, sufficient part performance to take it out of the statute of frauds, and certainty as to time and price, and mutuality; and all this must be shown by plaintiffs and concur, and they must show that they are the assignees before they would be entitled to a decree. Olive vs. Dougherty, 3 Iowa, 371.

We submit that plaintiffs fail in this, even if Brazil, the only witness for plaintiffs, was competent; for he does not prove price, time or mutuality, nor does he prove any distinct act of part performance done under the contract and referrable to it, and all the other

testimony, direct and circumstantial, contradicts the whole theory of plaintiffs.

We deem it unnecessary to argue at length the proposition that plaintiffs' right to specific performance cannot be greater, nor can it rise higher than the rights of Brazil, and this case must be viewed as though Brazil were applying for relief. We do not suppose that it will be claimed that Brazil, as surviving partner, had any right to convey or mortgage Barron's private property, outside of, and independently of a contract, to convey.

The contract must be established by competent and satisfactory proof, clear, definite and certain. Lobdell vs. Lobdell, 36 N. Y., 327; Sims vs. McEwen, 27 Ala., 184; Curver vs. Lasoter, 36 Ill., 182; Brown vs. Wilson, 17 N. J. Eq., 180.

Brazil is not a competent witness, and his is the only testimony tending to raise even a suspicion of a contract. He is contradicted by every witness who testifies upon the case, and by every circumstance of it. But even waiving his competency, his testimony is not clear, definite and certain, and falls very far short of the requirements of the law in establishing a contract, or acts of part performance under it. Acts of part performance must be referrable to the contract, and *solely* applicable to the parol agreement. The case of Byrne vs. Romaine, 2 Edwards C. Rep., 446, was a case wherein a tenant was in possession at the time under a lease of ten years. The landlord agreed to extend the lease ten more years if certain improvements were made, which the tenant found too costly to make on a ten years lease. This agreement to extend was made by parol for ten years longer, but no rate of rent was

agreed on. The tenant supposed it would be the old rate. The Vice Chancellor settled the case, on bill for specific performance, with the short words above copied, and cited: Frame vs. Dawson, 14 Vesey, 386; Morphett vs. Jones, 1 Swant., 191; Phillips vs. Thompson, 1 J. C. R., 131, 149. If plaintiffs' theory is correct, and we are wrong, it is a little remarkable, in this case, that notwithstanding there is proof that Barron talked a good deal with his intimate friends and employes about this building and these lots, that not a single admission of his is proven, tending to show that Brazil had, or was to have, any interest in the new building. It is a little remarkable that among all the clerks and employees of Barron & Brazil, the contractors, and all who had anything to do with it, there was a common understanding among all that it was Barron's building; and this fact is clearly proved by repeated declarations of Barron while the work was going on, and explanatory of, and contemporaneous with it, that the property was his. It is a little remarkable, that no one but Brazil should have had the impression that the firm was to have an interest, and that understanding so loose, uncertain as to time of performance, price of property and the parties to whom conveyance could be made. No paper is shown proving the contract, no entry on books to which Barron gave his assent, no witness present who heard it. So that Mr. Brazil is in the attitude of setting up his claims against a dead man, whose mouth is closed in death, without the possibility of contradicting what he says, except by circumstances, declarations and acts. Shall these be denied their due weight? Will Mr. Brazil's impressions, however honestly entertained, interested and incompetent as they are, be allowed to weight down all else? Must this be, simply because a

St. Louis creditor has induced Brazil to endeavor to mortgage Barron's private property for a debt of his own? Even admitting that behind it there may have been equity against Barron, does that alter the law? For what right or power did Brazil have to give plaintiffs' rights superior to any other creditor of Barron over his private property? But even admissions alone, if they had been proven, would not be enough, if unsupported by other satisfactory evidence, and should be received with great caution. This whole subject is fully discussed in the case of Hood vs. Bowman, 1 Freeman's (Miss.), 293.

The courts of equity, for the purpose of preventing fraud, have gone very far in executing parol contracts when there was evidence of acts done in part performance. Yet it is now generally admitted, that the exception thus created has introduced nearly all the evils which it was the purpose of the Legislature to avoid, and it is said that the rule is not to be extended further. and Courts have regretted that any exception was ever made. Hood vs. Bowman, 1 Freeman Ch. Rep. (Miss.), 294; 2 Sch. & Lef., 5; Grant vs. Naylor, 4 Cranch, 235. In the last cited case a letter of guaranty was addressed to John and Joseph Naylor & Co. No such firm existed, and John and Jeremiah Naylor & Co. furnished goods on it. The Supreme Court of the United States held that the exception to the statute of frauds had been carried quite far enough. The contract to answer for the debt of another must be complete, in writing, and could not be explained by parol; therefore, John and Jeremiah Naylor & Co. could not recover on a letter addressed to John and Joseph Naylor & Co. Judge Marshall delivered the opinion of the Court.

The statute of frauds is an absolute law. To say the

least of it, it was a great stretch of judicial power to abrogate it, even to prevent fraud and injustice. But no Court has ever gone further.

The very object of the statute of frauds and perjuries, as its title indicates, is to prevent the fraudulent setting up of pretended agreements and then supporting them by perjury. 2 Story, Eq. Jur., sec. 753.

Before this statute courts of equity would never decree a specific performance of a contract to sell land, except there was clearly proved some act of part performance. Sugdon, Vendors and Purchasers, chap. 4, sec. 2, pages 107, 108, 7 Ed.; 2 Story's Equity, sec. 753.

After the statute, the rule was made more rigid as to part performance, as above indicated.

Now, in this case there is not a single act that was not done consistently with Barron's continued ownership of the property. He owned all the assets of the firm. Brazil put in comparatively nothing, as we have shown, and was at the time a debtor to a much larger amount to the firm than he had put in, while Barron was a creditor, and still is, to a sum much in excess of the cost of the building, and his equities are equal to plaintiff. Reeves vs. Ayres, 38 Ill., 418.

It is proved that directions were given to their bookkeeper to charge Barron with the cost of the building on the books, and after the first entry on building account, which was charged to Barron, the accounts were kept temporaraily, by charging the items to the contractors, or which ever one of them might be the real purchaser of goods, until the building was completed; and at the completion and final settlement with the contractors, the whole aggregate of goods taken up by the contractors was to be charged in gross to Barron. This method of keeping the account was proposed, for

convenience, to Barron, and was assented to by him. After the building was completed and the final settlement made with Seawell & Hartin, on the 5th of November, 1875, one month after Barron's death, Mr. Brazil directed the $6,802.50, cost of the building, to be charged to real estate account of the firm, contrary to the original directions of Barron; surely this is not evidence against Barron.

No possession of the ground or building was ever taken by Brazil or by the firm.

No specific price was agreed on for the land, nor time of payment or of conveyance specified. Barron was not even credited with any price on the firm's books. There is no specific contract, or act of part performance proved on the part of plaintiffs, and the weight of testimony is the other way. At the very time that Barron entered into the contract to build, he declared that he was building for himself, and explained the written contract that way; and this oral evidence does not contravene the rule which forbids the contradiction or explanation of the contract or writing. For, first, to explain that Barron & Brazil means Barron, is always legitimate. Nicholay et al. vs. Kay, 6 Ark., 67; 1 J. R., 38, 39; 10 J. R. 133.

And, secondly, the writing is not the essence of the transaction here to be proved; for, that question is, Who owns the building? The contract is merely collateral to this and incidental, and this parol evidence is admissable. See 1 Greenleaf Ev., sec. 87.

The writing does not estop Barron to show the whole truth, for it fails of that mutuality which is necessary to create an estoppel. Bigelow on Estopels, page 286.

In the case of Carpenter vs. Buller, 8 Mees. & Wel. 209, the Exchequer Court of England held, that the

recitals in a deed, introduced in evidence collaterally, like this, in an action of trespass, might be explained by showing that the admission was made under a misapprehension. Parke Baron, in delivering the opinion says: "All the instances given * * * under the head of estoppels by matter of writing, except one, which relates to a release, are cases of estoppel in actions *on the instrument itself* in which the admissions are contained. By his contract in the instrument itself, a party is most assuredly bound, and must fulfil it. But there is no authority to show that a party to the instrument would be estopped in an action by the other party, *not founded on the deed* and wholly collateral to it, to dispute the facts so admitted."

Brazil was not bound by the contract with Hartin & Seawell, and could have shown it, while, perhaps, in a suit between Hartin & Seawell, on the contract, Barron could not have shown the fact. Yet it did not conclude in a collateral proceeding between himself and other parties, and parties are never estopped to show the character or meaning of their own acts in executing an instrument. Bank of Steubenville vs. Hoge, 6 Ohio, 17; 5 Ohio, 207; 21 Pick., 195; 26 Vermont, 19, 34.

And this is always allowed in equity. Hempstead & Conway vs. Watkins, 6 Ark., 317.

Courts of equity will always hear evidence to show the real truth in cases of accident, mistake or fraud. So they will allow parol evidence to rebut a presumption or an equity arising out of written instruments. But in these latter cases they do not interfere with, or repel the proper construction of the instrument itself. But only the artificial rules of presumption, or of equity, which they themselves have created or applied to cases perfectly determinate in their nature, and admitting of

either construction, according to the real intent of the parties. 2 Story's Equity. sec. 1531.

If a decree can be rendered upon this evidence of Brazil's in the face of these declarations of Barron, then no partner would be safe in building a business-house for his firm on his own land, lest a mistaken partner might suppose, and swear, after the builder was dead, that he had some rights there.

We call the attention of the court to the fact that the partnership expired by its own terms about the time this building was to be completed and occupied, and therefore the presumption is strongly in favor of our theory, to say nothing of the absurdity of Barron's acting for himself, in giving possession, and as partner acting as agent for Brazil, which would be a violation of all the laws regulating agency, for no man can deal with himself in that way—act for himself with his right hand, as it were, and for another with his left. Story on Agency, secs. 9, 10, 210, 211. (And without possession there was no part performance.)

It will surely not be considered that the taking of possession by Brazil after Barron's death is an act of part performance, for there the other party was not capable of contracting—he was dead. Nor was he capable of consenting to any act of part performance, which consent the authorities show, is indispensable. Besides, have we any proof or pretence that Brazil ever set his foot upon the lots, or did any act in part performance of the contract to convey him half the lots? For it must come to that to be binding Is there any declaration or statement of his concomitant with the act of building, made at a time when Barron was alive to assent to, or deny it? Yet such declarations would have been competent if the claim here is sound, and these concomitant delara-

tions would be admissable, whether Brazil was a competent witness or not, under the rule laid down by Mr. Greenleaf. (See section above cited.) Even if the Court should find that the portion of lots 1 and 2, which is covered by the brick building, belonged to the firm (it will not be contended, in the face of the proof, that the balance of lots 1 and 2, or any of lot 3, belongs to the firm), still Brazil had no power or right to bind the firm or the estate of Barron after his death. Story on Partnerships, 343.

There must be, after death, an entire cessation of trade. Collyer on Partnerships, secs. 130, 131.

And under our administration laws (see title Administration, Gantt's Dig.), neither Barron's widow, nor administrator, had any power or right to trade for the estate. They might have bound themselves individually, but could never deal for the estate. Besides, the proof shows they did not do it.

If Brazil went on and plaintiffs dealt with him, and took his notes even for partnership debts, it became Brazil's debt and not Barron's. Story on Partnerships, sec, 368, *et seq.*

If Brazil had all he claims—a half interest—and the building, really, was the joint property of Barron & Brazil, it must still be shown that it was bought with partnership funds, and was held for partnership purposes alone, before it could be controlled in equity as partnership property, for the law makes them tenants in common *prima facie*, and neither can bind the interest of the other; and we will presently show that, even then, Brazil could not sell or convey alone, although it might be subjected to partnership debt. Thompson vs. Bowman, 6 Wallace, 316.

It does not follow, because two men may own jointly

a mercantile house that, therefore, the property is personal and each party may convey for the other. While it is true that land may be assets of a firm in equity, yet it must be clearly shown that the intention exists to hold it so.

It has been held, that even in case of personal property one partner cannot give a valid mortgage of the partnership assets, for that is not commonly within the ordinary scope of the partnership business. Clark vs. Houghton, 12 Gray (Mass.), 38.

When real estate is conveyed to a firm, or to the members thereof, in trust for the firm, the partners become tenants in common of the estate, and neither of them can alone convey more than his undivided interest therein. Anderson vs. Thompson, 1 Brock., 456; Willey vs. Carter, 4 La., Ann., 56; Arnold vs. Stevenson, 2 Nev., 234; Donaldson vs. Bank Cape Fear, 1 Dev. (N. C.) Eq., 103; Wild vs. Peters, 1 La., Ann., 432; McWhorter vs. McMahon, 1 Clark (N. Y.), 400.

The case in Brockenbrough, is very much like this. Tompkins, one of the firm of Tomkins & Murray, after the dissolution, undertook to convey to a creditor the lands and city lots in Richmond, Virginia, which were owned by the firm. Chief Justice Marshall decided the case. Tompkins had made a deed, by which he had attempted to convey all personal as well as real property of the firm. It was contended that a whole sale of all partnership goods was not the usual course of trade. Judge Marshall held that as to personal property belonging to the partnership, the power was complete to sell all. He held that, although the personal property was conveyed by deed, which one party at common law had no right to seal for another, except when authorized thereto by special power, made no difference.

But when he came to consider that portion of the deed which attempted to convey the realty, Judge Marshall says:

"*Second*—The next subject to be considered is the real property comprehended in this deed. Real property, whether held in partnership or otherwise, can be conveyed only by deed, executed in the manner prescribed by statute.

"This deed can convey no more title at law than is in the person who executed it. Property conveyed to a firm, or to partners in trust for a firm, is held by them as tenants in common, and neither party can convey more than his undivided interest." See, also, Delaney vs. Hutchison *et al*, 2 Randolph.

If Barron had been living and the partnership in full life, the real estate, to the extent of Barron's interest, could not have been conveyed by mortgage, or otherwise, by Brazil.

It is old common law learning that no partner can bind another by bond, deed or other sealed instrument, and it only becomes the personal obligation of the person signing in such case. Lee vs. Onstott, 1 Ark., 206; Day vs. Lafferty, 4 Ark., 450; Meek vs. Fowler, 14 Ark., 31.

In view of the rules then existing, it is a little remarkable that Judge Marshall, at that early day, should brush aside form and hold that the actual sale and delivery of the goods was sufficient, and that it was not rendered void because there had been an abortive attempt to convey by deed. But when he comes to the realty, he recognizes the necessity of a personal act of the owner and compliance with the forms of law, independently of the necessity of a seal. His decision as to this is based upon the nature of the interest. Although this was firm real estate, it did not thereby necessarily become partner-

ship assets, subject to disposal by one partner, nor does it here. We cannot reasonably suppose that Barron intended to convey a half interest to Brazil, build a fine fire-proof building on it just about the time the firm business closed by the terms of the articles of partnership, and when the firm owned a building at the time sufficient for their business during the partnership, all for the purpose of giving Brazil power to sell him out, living or dead.

Surely, the abolition of seals does not carry such consequences with it. If that be true, that it does, then seals were more than mere dead form—they covered the very substance of real rights. We have always been led to believe that they were silly and absurd forms. They will prove to be nothing more if Courts, now that they are abolished, will guard as carefully important rights as they were guarded at common law. Sealing was, at common law, a solemn act of melting wax and making an impression upon it. No one could do this for another, except he was thereunto, by like solemn act, duly authorized. As the conveyance of real estate, after deeds came in vogue, could only be executed in this solemn form, no partner ever had power to convey the real estate interest of another.

The mere abolition of seals in this State, surely, did not have the effect of giving a power where none existed before. If it were otherwise, then the proof will be clear that the derided and ridiculed forms of the common law were, indeed, vessels freighted with the dearest and most substantial rights.

In our State, mortgages must be signed and ackowledged, and recorded, before they become a lien at all. Gantt's Digest, secs. 4287, 4288; Appendix D 4;

Jacoway vs. Gault, 20 Ark., 190; Carnall vs. Duval, 22 Ark., 136.

The signing and acknowledgment of a deed or mortgage is an act that must be performed by the party conveying, or his agent must be authorized thereto in writing. All contracts concerning land are required to be in writing by the statute of frauds. To allow a third party to act, unless their authority is in writing, lets in all the mischief which the statute of frauds was intended to prevent, besides being a direct violation of the statute regulating the conveyance of real estate. Gantt's Dig., sec. 840; Appendix, E 5.

In this State, every interest in real estate, granted or devised to two or more persons, other than executors and trustees as such, is a tenancy in common, unless expressly declared otherwise in the deed or will. Gantt's Dig., sec. 837; see Appendix.

It would be a violation of the registry laws, which contemplate keeping and showing a regular chain of titles. It is true that it has been held that while a surviving partner cannot convey partnership real estate, he may create such an equity as will entitle the purchaser to a decree against the heirs. This is upon the ground that the surviving partner is bound for the debts. Andrews vs. Brown, 21 Ala., 437.

In Arkansas the surviving partner is not bound alone for partnership debts, as at common law, but the estate of the deceased is likewise bound.

The case of Roberts vs. Totten, 13 Ark., 609, decides that where a partner uses partnership funds to build a house, he is chargeable with them on settlement. Death dissolves a partnership *per se*, unless by contract or will it is otherwise provided. Scholefield vs. Eichelberger, 7 Peters; Knapp vs. McBride, 7 Ala., 19; Goodwin vs.

Stevens, 5 Gill (Md.), 1; Williamson vs. Wilson, 1 Bland (Md.), 418; Gratz vs. Bayard, 11 Serg. & R. (Pa.) 41; Davis vs. Christian, 15 Gratt. (Va.), 11.

It may be continued by deceased partner's will. Burwell vs. Mandeville, 2 How., 560; 5 Ark., 61.

On decease of a partner, his interest in real estate belonging to partnership descends to the heirs, subject to the equities of partnership creditors. Piatt vs. Oliver *et al.*, 3 McLean, 27.

We ask the Court to carefully examine the case last cited. The precise question here was under consideration, and after full and able argument, and a re-argument by further counsel, Judge McLean held, as Judge Marshall had held in the case cited from Brockenborough, that a surviving partner had no power over partnership realty, to sell or encumber it. After holding that the creditors have equitable rights to subject partnership real estate, and quoting from Mr. Collyer, Judge McLean uses this language: "To hold that a partner in lands could sell and transfer them as he could a bolt of muslin, would disregard the law and its policy, and would introduce great confusion and uncertainty in land titles, referring to the statutes of Ohio, which, like ours, requires land to be conveyed by deed.

We will, upon these authorities and arguments, submit this case No. 467.

SOL. F. CLARK,
SAM. W. WILLIAMS,
Attorneys for Mitchell.

APPENDIX.

REFERENCE TO STATUTES, COPIES OF WHICH ARE REQUIRED TO ACCOMPANY BRIEFS.

GANTT'S DIGEST.

A. 1.

SECT. 4,481.

The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. But when a determination of the controversy between the parties before the court cannot be made without the presence of other parties the court must order them to be brought in.

SECT. 4,482.

Where, in an action for the recovery of real or personal property, any person having an interest in the property, applies to be made a party, the court may order it to be done.

B. 2.

SECT. 829.

All lands, tenements and hereditaments, may be aliened, and possession thereof transferred by deed, without livery of seizin, and the words, "grant, bargain and sell," shall be an *express covenant* to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible *estate in fee simple, free from* incumbrance done or suffered from the grantor, except rents or services that may be expressly reserved by such deed, as also for the quiet enjoyment thereof against the grantor, his heirs and assigns, and from the *claim* or *demand* of all other persons whatsoever, unless limited by express words in such deed.

C. 3.

STATUTE OF FRAUDS.

SECT. 2,951.

No action shall be brought:

First, To charge any executor or administrator, upon any special promise to answer for any debt or damage out of his own estate.

Second, To charge any person upon any special promise to answer for the debt, default or miscarriage of another.

Third, To charge any person upon an agreement made in consideration of marriage.

Fourth, To charge any person upon any contract for the sale of *lands*, *tenements* or hereditaments, or any interest in or concerning them.

Fifth, To charge any person upon any lease of lands, tenements or hereditaments for a longer term than one year.

Sixth, To charge any person upon any contract, promise or agreement that is not to be performed within one year from the making thereof, unless the agreement, promise or contract upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized.

D. 4.

MORTGAGES.

SECT. 4,287.

All mortgages, whether for real or personal estate, shall be acknowledged before some person authorized by law, to take the acknowledgments of deeds, and shall be recorded, if for lands in the county or counties in

which the lands lie, and if for personal property, in the county in which the mortgagor resides.

SECT 4,288.

Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property, from the time the *same is filed* in the recorder's office for record and not before; which filing shall be notice to all persons of the existence of such mortgage.

E. 5.

MODE OF CONVEYING.

SECT. 840.

Deeds and instruments of writing for the conveyance of real estate shall be executed in the presence of two disinterested witnesses, or, in default thereof, shall be acknowledged by the grantor in the presence of two such witnesses, who shall then subscribe such deed or instrument in writing for the conveyance of such real estate, and when the witnesses do not subscribe the deed or instrument of writing aforesaid at the time of the execution, those of the date of their subscribing the same shall be stated with their signatures.

SECT. 846.

The acknowledgment of deeds and instruments of writing for the conveyance of real estate, or whereby such real estate is to be affected in law or equity, shall be by the grantor appearing in person before such court or officer having the authority by law to take such acknowledgment, and stating that he had executed the same for the consideration and purposes therein mentioned and set forth.

SECT. 850.

All deeds and other instruments in writing for the conveyance of any real estate, or by which any real estate may be affected in law or equity, shall be proven or duly acknowledged in conformity with the provi-

sions of this act, before they or any of them shall be admitted to record.

SECT. 851.

Every letter of attorney containg a *power* to convey any real estate as agent or attorney for the owner thereof, or executed, as agent or attorney for another, any deed or instrument in writing that shall convey any real estate, or whereby any real estate shall be affected in law or equity, *shall be acknowledged* or proven and certified and recorded with any deed that such agent or attorney shall make in virtue of such letter of attorney.

F. 6.

PARTNERSHIP AND JOINT OBLIGATION NOT DESTROYED OR IMPAIRED BY DEATH OF ONE CO-OBLIGOR.

GANTT'S DIGEST.

SECT. 3,585.

All joint debts or obligations shall survive against the heirs, executors and administrators of such joint debtor or obligor, as may die before the discharge of any such joint debt or obligation.

SECT. 3,587.

Joint obligations shall be construed to have the same effect as joint and several obligations and may be sued on, and recoveries had thereon in like manner.

SECT. 3,588.

Suits may be brought against the surviving obligor, and the heir, executor or administrator of deceased obligor at the same time.

SECT. 3,589

Provides that there shall be but one satisfaction and costs of one suit.

SECT. 3,590.

All survivorships of real and *personal estate* are forever abolished.

FEB 7 1882

IN THE
SUPREME COURT
OF THE
UNITED STATES.

NUMBER 467.

JOHN H. DOWELL & CO., APPELLANTS,

vs.

C. E. MITCHELL, ADM'R OF BARRON, APPELLEE.

Reply of Mitchell to argument of Hon. A. H. GARLAND, U. S. S., Counsel for DOWELL & CO.

We would rest this case upon our former argument, without anything in reply or addition, but for the statement of the counsel who prepared the argument for Dowell & Co., whose name appears last in the signatures. The counsel whose name first appears, Gen. Henderson, prepared the bill in the case and argued the same in the Court below, and now admits that such a proposition was never thought of as this, which is made on page 5 of Mr. Garland's brief, to-wit:

"There is *no dispute* that the land covered by the mortgage was purchased with partnership funds and used for partnership purposes," etc.

This statement is remarkable, in view of the statements of

OFFICE SUPREME COURT U. S.
FILED
DEC 30 1881
H. McKENNEY, C.

Supreme Court of the United States.

October Term, 1881.

C. E. MITCHELL, ADMINISTRATOR, &C., *vs.* JOHN H. DOWELL ET AL. — No. 221.

JOHN H. DOWELL ET AL. *vs.* C. E. MITCHELL, ADMINISTRATOR, &C. — No. 467.

Appeals from the Circuit Court of the U. S. for the Eastern District of Arkansas.

BRIEF FOR DOWELL ET AL.

In fact there is but one suit here, although there are two or cross-appeals. There is but one record, and but one decree is appealed from.

The pleadings are sufficiently well set forth in the argument on behalf of Mitchell, by Messrs. Clark & Williams, attorneys, on file in this case ; and, to avoid prolixity and

detail, they will not be stated further here, except by mere reference.

Errors.

The court below erred in finding the real estate described in the plaintiffs' (Dowell *et al.*) bill, and alleged to be partnership property of Barron and Brazell, was not partnership property, and that said Brazell had no right to execute the mortgage mentioned in the bill, and that the mortgage executed by him was void; and in denying a decree of foreclosure of such mortgage. (Trans., original 93; print 34.)

But the court below did not err in overruling the demurrer to the bill. (Trans., print 17, 18.)

Nor in neglecting and refusing to suppress the depositions of Norman and others in so far as they detail conversations with, and letters of Brazell.

Nor in rendering a decree against the administrator for the balance due from Brazell.

Nor in maintaining jurisdiction over the cause, when it was shown that the subject-matter of the suit was in the hands of a receiver appointed by the State court.

The consideration of the first and fourth assignments of error by counsel for Mitchell, to which joinder is here entered, will properly be united, as they touch the question of jurisdiction. As a matter of fact the fourth assignment is an error. This same suit was not in a State court, nor was the subject-matter of it. The record from the State court (Trans., print 29 *et seq.*) shows a proceeding by the administrator of the deceased partner against the surviving partner to prevent waste and mismanagement, for the appointment of a receiver, and the settlement of the partnership affairs. All of this was one thing; but the proceeding by a non-resident creditor against the partnership property and assets was quite another. And it made no difference what that pro-

ceeding in the State court was, Dowell & Co. (non-residents) had the right to proceed in equity on their mortgage in the U. S. court. The equity jurisdiction of the U. S. courts does not depend upon, nor is it affected by, the State laws, State jurisdiction, or State procedure.

Payne v. *Hook*, 7 Wall., 425, covers this case as to this point from beginning to end. If more were needed, it could be found in *Railway* v. *Whitlow*, 13 Wall., 286, where the court say: "Whenever a general rule as to the property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court, in a case between proper parties, is a matter of course, and the jurisdiction of the court in such case is not subject to State limitation."

If in all this anything is omitted, it will probably be found in the case of *Broderick's Will*, 21 Wall., 520, where it is uttered by the court: "*Whilst it is true that alterations in the jurisdiction of the State courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States, so long as the equitable rights themselves remain*," &c., &c.

Lest something might be lacking yet, the court can protect itself in this jurisdiction by referring to what it affirmed from the court whose decision we are now considering, in *Williams* v. *Bankhead*, 19 Wall., 563. Green vs. Creighton 23 How. 90. Kennedy vs Cocoode — 101 U. S. 641.

On the question of suppressing the depositions of Norcum and others, in so far as they give conversations with and letters of Brazell, very little need be said. Indeed, the court below did not think enough of this to even pass upon it. Brazell was a defendant in this suit, and as a partner of Barron, upon general principles his acts and declarations as to partnership matters were admissible in evidence.

1 *Greenleaf Ev.*, 177, 189.
Story on Part., (7th edition,) secs. 344, 346, 347.
36 *Maine*, 544.

And surely there is nothing in the act of Congress touching the testimony of parties to render this testimony incompetent; (*Rev. Stats.*, sec. 858, p. 162;) and it has been construed by the courts so frequently, upon this very question, that a bare reference to some of the decisions is all that is needed.

Johnson v. *Owens*, 2 Dill., 475.
Eslava v. *Mazangis' Adm'r.*, 1 Woods, 623.
Railroad Co. v. *Pollard*, 22 Wall., 341.
Texas v. *Chiles*, 21 Ib., 488.
Cornett v. *Williams*, 20 Ib., 226; Ib., 528.
Lucas v. *Brooks*, 18 Ib., 436.
Green v. *U. S.*, 9 Ib., 655.

All the common law learning as to competency of parties to a suit as witnesses, or of a warrantor of title to property in suit, or of one interested in the suit, is now laid aside and shelved in the U. S. courts, and we are remitted to another dispensation, which does not reject the depositions here objected to.

The other assignment of error by counsel for Mitchell—that the court below rendered a decree against the personal estate of Barron—proceeds upon the false assumption that Brazell could do and say nothing as to the partnership business; that he had to stand still because Barron had died; but the truth is, Brazell, as survivor, had all and complete authority to go forward and settle up the business. He was the representative of the firm as to all outstanding and unsettled business.

1 *Greenleaf*, supra; *Story on Part.*, supra.
Wickliffe v. *Eve*, 17 How., 468.
In re Clap, 2 Low, 168, (Dist. Mass., 1872.)
Marlatt v. *Scantland*, 19 Ark., 443.

Should this be true, as counsel on the other side contend, then Dowell & Co., undisputed creditors of the firm, are in a

pitiable condition. They must be ruled out on the mortgage, and they cannot have any final decree as to Barron! Then what are they to have for a debt just and due? That brings us to really the question, and the only one involved here; and the decree against Barron's administrator for $10,793.10, proper and right as it is, carries with it logically a decree on the mortgage. The right in the one is involved and embraced in the right of the other, and cannot well be separated. The right to a foreclosure of the mortgage, then, will now be discussed.

There is no dispute, in our mind, that the land covered by the mortgage was purchased with partnership funds and used for partnership purposes. This makes it in law partnership property, and liable in equity for partnership debts; and whoever has the legal title will be held, in equity, as trustee for the whole concern.

3 *Kent's Comm.*, 38.
Sigourney v. *Munn*, 7 Conn., 11.
Hoxie v. *Carr*, 1 Sum. C. C., 182–86.
Edgar v. *Donnelly*, 2 Munf., 387.

Real estate may be bought and held for the purpose of the partnership and really be a part of the stock in trade; the conveyance in such a case may be in the name of one for the benefit of all partners, and in case of dissolution by death it will vest exclusively in the surviving partner. It is a part of the partnership funds, whatever may be the form of the conveyance.

Story's Eq. Juris., sec. 674.
2 *Barb. Ch. R.*, 165.
19 *Vermont*, 278.
2 *Sandf. Ch. R.*, 359.

Real estate purchased with partnership funds or for the use of the firm, is in equity chargeable with the debts of

the firm, and is a fund properly applicable to the payment of the firm debts.

Drewry v. *Montgomery*, 28 Ark., 257.
See also *Story on Part.*, 127 *et seq.*
Dyer v. *Clark*, 5 Met., (Mass.,) 562.
Andrews v. *Brown*, 21 Ala., 437.

Manett v. *Murphy*, 11 Bankr. Reg., 131, determines this question absolutely.

"In the light of these authorities" there can be no question this real estate was liable for the debts of this firm.

The testimony of Dowell, Norcum, and Brazell shows conclusively that payments made by Brazell to Dowell & Co. from time to time, were made generally without any directions as to their appropriation. It is in proof also that on the death of Barron a rest was made and a new account started, and that payments, when made, were applied to the new account. The plaintiffs (Dowell & Co.) had the right to do this.

Marshall v. *Sloan*, 26 Arks., 513.
Story Eq. Juris., sec. 459 *g*.
1 *Mason*, 338.
37 *Penn. Stat.*, 68.
2 *Parsons on Cont.*, 141.

It is insisted that, admitting Barron's contract with Brazell to convey lots 1 and 2, in block 27, to the firm, Brazell being charged with one-half the purchase-money of the lots, it cannot be enforced because not in writing; and the defendants plead the statute of frauds. The statute does not embrace it, because although Barron held the legal title, yet if it was agreed that the ground was to be improved with partnership funds for partnership purposes, equity will hold him to have been a trustee for the benefit of the firm, and will not permit the trust to fail.

3 *Kent*, supra; 2 *Munf.*, supra.

But if the statute does apply, the case as made is taken out of it. Barron agrees to sell the lots to B. & B., to be by them improved; he contracts in the name of Barron & Brazell to have them improved, and this is done and paid for out of partnership funds. He himself put the firm in possession the very moment ground was broken for the erection of the store. Here then is a clear contract showing—

1st. The lots were to be the property of the firm.

2d. The price to be paid was what the lots cost Barron, and the same were improved under that contract, and it was partly improved under the directions of Barron himself. With all this, the law as announced in *McNeill* v. *Jones*, 21 *Arks.*, 277, is fully complied with. So that as Barron in his lifetime could not have renounced this contract after thus being a party to its making, and its part performance, his legal representatives will not be permitted to avoid it.

Much light can be thrown on the intention of Barron in this undertaking by looking at certain facts in the record. Briefly they are these:

(A) Barron and Brazell were merchants and partners, and as such doing business in the town of Hope.

(B) Barron purchased the lots and had the deed made to himself.

(C) The object of the purchase was the erection thereon of a store-house.

(D) The building contract was drawn and executed in the name of Barron & Brazell.

(E) Up to that time the firm had been transacting its business in a store-house owned by the firm, and it is reasonable to suppose it would so continue.